Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ISRAEL TRAVEL ADVISORY SERVICE, INC.,

Petitioner,

v.

ISRAEL IDENTITY TOURS, INC.,
LARRY RITTER, AND MARLENE RITTER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a person, who was injured in their business or property through a pattern of racketeering acts, must also be within the class of persons that the alleged predicate acts were designed to protect in order to have standing to pursue a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et. seq.; i.e.*, must a civil RICO plaintiff have standing to pursue the underlying predicate acts in addition to having standing under the RICO statute itself.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Israel Travel Advisory Service, Inc.'s ("ITAS") principals, Celia Shar (President) and Marilyn Ziemke (Vice-President), were made cross-appellees in the Seventh Circuit proceeding as a result of Defendants' appeal of the dismissal of their counterclaim against Ms. Shar and Ms. Ziemke in their individual capacities.

Also, the following were parties to the original proceeding in the district court: Ilene Wallerstein, Gilbert Wallerstein, Israel Identity Tours, an Illinois corporation (now doing business as Israel Discovery Tours, Inc.), Karen Kaplan and Integrity Enterprises d/b/a Israel Identity Tours of Massachusetts. Prior to trial, Plaintiff-Petitioner settled with these parties, who did not subsequently participate in the proceedings.

There are no parent or subsidiary companies to be listed.

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OPINIONS BELOW

The Seventh Circuit's opinion affirming the district court's order granting summary judgment against Petitioner with respect to the RICO counts is published at 61 F.3d 1250 and is attached hereto as Appendix A. (App. 1 to App. 19).

The district court decision granting summary judgment against Petitioner, is not published in a reporter, but can be found on Lexis at 1993 U.S. Dist. LEXIS 6141, and is attached hereto as Appendix B. (App. 20 to App. 30). The district court decision denying reconsideration of its summary judgment decision on the RICO counts, is not published in a reporter, but can be found on Lexis at 1993 U.S. Dist. LEXIS 8744, and is attached hereto as Appendix C. (App. 20 to App. 30).

The Seventh Circuit's order denying rehearing and denying the suggestion for rehearing *en banc* is not published in a reporter and is attached hereto as Appendix D. (App. 50).

JURISDICTION

On July 20, 1995, a panel of the Seventh Circuit affirmed the district court's granting of summary judgment against Plaintiff-Petitioner with respect to claims brought pursuant to the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiff-Petitioner's motion for rehearing with a suggestion for rehearing *en banc* was denied on August 16, 1995. On November 9, 1995, this Court, through Justice Stevens, granted the Petitioner's motion for an extension of time in which to file a certiorari petition and ordered the *certiorari* petition to be filed on or before January 11, 1996. This petition has been filed by that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this petition are the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1969, the applicable text of which is attached hereto as Appendix E. (App. 51 to App. 53).

STATEMENT OF THE CASE

Procedural History/Opinions Below

In April 1992, Plaintiff-Petitioner, Israel Travel Advisory Service, Inc. ("ITAS"), filed a Complaint against, among others, Defendants-Respondents. In this Complaint, ITAS alleged that Defendants engaged in various forms of unfair competition, including trade defamation and violations of the Illinois and New Jersey Consumer Fraud Acts, the Lanham Act, the Sherman Act and Racketeer Influenced and Corrupt Organizations Act ("RICO") (DE [1], SA-B).[1] Original subject matter was had over the matter pursuant to 28 U.S.C. § 1331.

The district court, having previously resolved all other claims in favor of Defendants "as a matter of law," either on summary judgment or directed verdict (DE 176 & 177, 203 & 204, 223 & 224; Tr. 1264-1278, 1452-1462), submitted only the Lanham Act and defamation claims to the jury.

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[1] For the purposes of this Petition, citations to the record below will be in the following form: "DE #" refers to the Docket Entry Number of the document being referred to; "Tr. #" refers to a page of the transcript of the proceedings; "PX #" refers to a Plaintiff's trial exhibit; and "DX #" refers to a Defendants' trial exhibit.

Citations to a page of the Appendix attached to this Petition will be in the form "App. #."

The district court refused to allow ITAS' RICO claim to go to the jury because ITAS, as a business competitor of the alleged racketeers, did not suffer a "direct loss" of business as a result of the pattern of mail and wire fraud perpetrated against its potential customers, but rather was only "indirectly injured." (App. 24). In other words, the district court held that derivative injury is never cognizable under RICO. The district court also found Plaintiff's RICO claim defective on the purportedly "alternate" ground that only ITAS' potential customers, and not ITAS, had relied upon the allegedly fraudulent mailings. (App. 25). As the Seventh Circuit noted, however, this holding merely "restates the conclusion that derivative injury is never cognizable under RICO; it does not require separate analysis." 61 F.3d at 1257; App. 12.

Those claims that did survive summary judgment and/or directed verdict were tried before a jury on December 3, 1993. The jury rendered its verdict against Defendant-Appellant, IIT, Inc., on the defamation count and awarded ITAS $177,945.00 in compensatory and punitive damages. The jury found in favor of Defendants on all other counts (DE 298). Judgment was entered on the jury verdicts (DE 299) and entered on the district court docket on December 7, 1993 (DE 300).

Both parties filed timely post-trial motions (DE 306-309), which, after full briefing, were denied on January 26, 1993 and docketed on January 28, 1993. (DE 323 & 324). On February 7, 1994, IIT filed a motion to reconsider the denial of its post-trial motions (DE 327), which was briefed and denied (DE 342, 343). A notice of appeal was timely filed by ITAS on February 25, 1994 and a notice of cross-appeal was timely filed by Defendants, Larry Ritter, Israel Identity Tours, Inc. and Marlene Ritter (DE 331, 339), who sought, among other things, to reinstate the counterclaim that was dismissed as a result of their discovery abuse.

Appellate jurisdiction was conferred by 28 U.S.C. § 1291, allowing appeal as of right from a final decision of a district court. The case was argued before the United States Court of Appeals for the Seventh Judicial Circuit on January 9, 1995, and decided on July 20 1995, *rehearing denied*, August 16, 1995. *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250 (7th Cir. 1995).

While the district court's decision was affirmed in all respects, ITAS seeks review of only that portion of the decision affirming the grant of summary judgment to Defendants on the RICO claims.

The Seventh Circuit correctly held that the district court misinterpreted this Court's decision in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311 (1992). Stating that the holding "in *Holmes* is no more than that common law ideas about proximate causation inform the understanding of RICO," the Seventh Circuit noted that *Holmes* "did not mean to preclude all possibility of recovery for injury that was transmitted indirectly." *Israel Travel*, 61 F.3d at 1257; App. 11. In other words, if a RICO plaintiff's injury was proximately caused, it is immaterial that the injury was "indirect."

Here, ITAS clearly satisfied the "proximate cause" requirement ratified by *Holmes*. In the words of the Seventh Circuit, "there is no doubt that a producer injured by a campaign of misinformation suffers an injury [that] is not cut off by the proximate causation and foreseeability requirements." *Id.* at 1257; App. 12.

Further holding that this case neither entailed a risk of multiple recoveries nor presented "apportionment problems" *vis-a-vis* damages, *id.*, and noting that "lost business

opportunities" are "property" under the mail fraud statute, *id.* at 1258, App. 13, the Seventh Circuit rejected other "standing" type problems.

After ITAS cleared these initial hurdles to standing, the panel then introduced a novel standing requirement uncontemplated by both this Court's prior rulings and the RICO statute itself.

Specifically, the panel examined whether or not ITAS was part of the class of people that the federal mail fraud statute, 18 U.S.C. §1341, was created to protect. Thus, according to the panel, ITAS (or any other RICO plaintiff) must effectively satisfy two standing requirements: (1) the standing requirement imposed by RICO — that one be injured in business or property by reason of a pattern of racketeering — refined by this Court's proximate cause analysis in *Holmes*; and (2) a new standing requirement that the RICO plaintiff be part of the class of persons that the statute outlawing the predicate act was designed to protect.

The only case upon which the Seventh Circuit claimed to rely in creating this "double standing requirement" was *Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991). *Israel Travel*, 61 F.3d at 1258; App. 13. *Lancaster*, however, made no mention of any double standing requirement, as it focused primarily on whether lost business opportunities were property under the mail fraud statute.

It is the imposition of this "double standing requirement," which ITAS is requesting that this Court reject. Under the Seventh Circuit's view, in a situation where the perpetration of mail fraud served as the predicate act, as in this case, a business competitor would **never** be able to obtain standing. To quote

the Seventh Circuit, "business rivals may not use RICO to complain about injuries derivatively caused by mail frauds perpetrated against customers, because only the customers are the beneficiaries of the statutory protection." *Israel Travel*, 61 F.3d at 1257; App. 13. By engrafting a double-standing requirement upon civil RICO, as well as its arbitrarily excluding competitors from the pool of potential RICO plaintiffs, the Seventh Circuit engages is a dangerous act of judicial activism, which is in direct conflict with this Court's precedent, the text and legislative history of RICO, and existing case law throughout the nation.

Factual Background

On April 21, 1991, while attending the Israel Independence Day celebration at Temple Beth Shalom in Livingston, New Jersey, Defendant Larry Ritter approached El Al representative Fred Spiegel and told Mr. Spiegel that "he really does not need [his Israel] travel business," and that he was in business for one purpose and one purpose only, to "screw the ladies" and "teach them a lesson." (Tr. 1098-99). By "the ladies" Mr. Ritter meant Ms. Celia Shar, age 78 (Tr. 1168), and her daughter, Ms. Marilyn Ziemke, the founders of Israel Travel Advisory Service, Inc., commonly known as "ITAS." (Tr. 1099).

For the past 23 years ITAS has been run out of the kitchen of Ms. Shar and Ms. Ziemke's Livingston, New Jersey home (Tr. 776-777), and has specialized in providing bar and bat mitzvah group tours to Israel — in other words, group tours to Israel where the primary purpose of the trip is to celebrate a child's bar or bat mitzvah. (Tr. 789-90, 796). Ritter denied making any such remark to Mr. Spiegel, claiming that his goal was merely to send people to Israel (Tr. 583-584), a goal he sought to effectuate by forming a "loose federation" (Tr. 76-77) with Ms. Ilene Wallerstein, ITAS' former Chicago sales

representative, whom Ritter testified had repeatedly professed her own desire to "kill" and "destroy" ITAS. (Tr. 100-101, 103-104). It is this "federation" that ITAS alleged was the RICO enterprise. That allegation has never been disputed.

Ritter "liked Wallerstein's personality" (Tr. 115), and wanted to work with her, even after he knew her intention and philosophy was to "kill" and "destroy" ITAS. (Tr. 102). Together with Ritter, Ritter's wife, Marlene, ITAS' former Boston sales representative, Karen Kaplan, one of ITAS' former tour guides, Ben Ami Geller, and ITAS' former land facilitator, Transglobal Travel Ltd., an Israeli corporation (which at the time was run by Benny Sivan and David Frank), Wallerstein, in December 1990, "announced the formation of IIT." (PX 134).[2]

Like ITAS, IIT also engages in the business of selling and providing bar/bat mitzvah group tours to Israel. What IIT calls "free competition" (Tr. 1170), however, ITAS describes as "unfair competition" (Tr. 1170). For instance, ITAS presented testimony at trial that IIT and/or agents of IIT made numerous defamatory remarks about ITAS (Tr. 571-572, 575-577, 598, 600-601, 705-706). IIT denied making such remarks. (Tr. 356-

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[2] Ritter is the president of IIT, Inc. Ritter, M. Ritter and IIT, Inc. are collectively referred to in this brief as "IIT" or, sometimes, "Defendants." Wallerstein was the president of IIT Illinois, which in January 1993 changed its name to "Israel Discovery Tours, Inc." (Tr. 384-85). Kaplan was the president of IIT Massachusetts. Kaplan, IIT Massachusetts, Wallerstein, IIT Illinois, and Wallerstein's husband, G. Wallerstein (sometimes collectively referred to herein as the "settling defendants"), settled with ITAS in January 1993 (DE 78, 79), and thus are no longer parties to this proceeding. IIT Illinois, IIT Massachusetts and IIT, Inc. will sometimes be collectively referred to in this Petition as the "IIT Companies."

358). The issue went to the jury, and the jury awarded ITAS $75,000 in compensatory damages and $102,945.00 in punitive damages. (DE 298, 299 & 300). The jury, however, imposed its verdict only against IIT, Inc., finding Larry Ritter, as an individual, not liable for defamation. Moreover, the jury found in favor of both Ritter and IIT, Inc., on ITAS' Lanham Act claims.

IIT's defamatory conduct, however, was only ancillary to what ITAS believes was the centerpiece of the case, and the only issue involved in this petition — whether or not IIT violated RICO by engaging in a pattern of mail and wire fraud calculated to cause damage to ITAS' business by siphoning off customers.

ITAS' Free Bar Mitzvah Offer and the Ensuing Panic at IIT

Around the same time as IIT's formation in December 1990, ITAS unveiled a project that it had been developing for some time: a free tour of Israel for a bar/bat mitzvah celebrant when accompanied by paying adults. (Tr. 839-840). ITAS' "free" tour was in fact completely "free," except for optional Rabbi and insurance charges, which were nominal in amount and are not even included in ITAS' package price to the paying adults. Not only did ITAS' free trip include all meals, accommodations and touring, but it also included round trip airfare, both from the United States to Israel as well as internally within Israel. (Tr. 840). Since December 1990, when it was first introduced, this "free" offer has resulted in substantial business revenues and great publicity to ITAS and has been very "successful." (Tr. 849).

ITAS' free offer sent IIT into a virtual panic, and, as the stream of faxed correspondence with David Frank indicates, the

IIT Companies knew that they had to offer something similar or they could not compete with ITAS. (PX 34, 36, 42-44, 112, 116 & 350). For instance, Wallerstein said she was in the middle of a "war," (PX 34) and David Frank said "we did not give up a 2 million dollar account in order to play around . . . I intend to build [the bar/bat] mitzvah business up to the largest movement of its type in the USA . . . and I will not be stopped by anybody." (PX 36).

Trial Exhibits 34, 36, 39 and 40 address some of the IIT Companies' concerns about how to advertise and market their "free" trip. In PX 39, for instance, Frank warns against making the distinction between free land and free air. Initially, Wallerstein wanted to advertise "FREE LAND FOR BAR/BAT MITZVAH CELEBRANT" (PX 34; Tr. 500), but this idea was abandoned. (Tr. 500-501).

IIT's Pattern of Mail and Wire Fraud

Ultimately, IIT mailed throughout the United States certain circulars and advertisements offering tours to Israel. These advertisements claimed, like ITAS' advertisements, that a "bar/bat mitzvah child" is entitled to a "free tour of Israel." They further claim that the "tour includes:" (or sometimes the "price includes:") "El Al's lowest available airfare" and/or "El Al round-trip airfare." (PX 249 & 120). While the ad noted in small typeface that "restrictions apply," the IIT trip, did not include the airfare, which constituted 40% of the total price of the trip. When asked why he did not explain in the advertisement that the "free tour" was "land only" and did not include the airfare, Ritter stated if he did so people wouldn't call, and he wanted to induce people to call with their inquiries. (Tr. 200, 277). Ritter also acknowledged that if potential customers discovered that ITAS offered a free airfare and IIT did not, "there was very little to discuss" and "if a particular

customer knew that ITAS' free tour of Israel included airfare, [IIT] was through, [IIT] was not able to sell that customer." (Tr. 277).

Also, many IIT advertisements feature the name of a man named Joel Leibowitz (*See, e.g.*, PX 52, 87, 120), who Ritter, in telephone conversations and correspondence through the United States mails repeatedly represented was a "partner" in IIT. (Tr. 209). Leibowitz was, however, "never an officer, director, shareholder, or employee" of IIT, Inc. (PX 85). At trial Ritter admitted that he "lied" about Leibowitz' affiliation with IIT (Tr. 209), and did to induce people to travel to Israel with IIT because Leibowitz was very prominent in the community and known as "Mr. Israel." (Tr. 209).

Similarly, IIT mailed to customers and potential customers a "letter" from a local Rabbi, Rabbi Fellner, extolling the virtues of Israel and IIT and saying "I have been on the tour...." This brochure was mailed to hundreds of people in April 1991. (Tr. 170). At that time, however, Rabbi Fellner had never been on an IIT tour (Tr. 170).

Ritter admitted at trial that he "took liberties" (Tr. 1254) with his advertising in order to induce people to call. When people would call sometimes Ritter would have Wallerstein call them back. (Tr. 127-129, 274). Wallerstein would then defame ITAS. (*See, e.g.*, Tr. 600-601, 704-705).

REASONS FOR GRANTING THE WRIT

The Question Presented in this case is essentially the same as the question presented but, over the objection of four concurring Justices, not reached in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). Now is the time to reach this important question because the Seventh Circuit has created a novel and unprecedented double standing requirement for civil RICO plaintiffs that contradicts Supreme Court precedent, clearly exceeds the plain meaning of the statute as drafted by Congress, and conflicts with existing case law throughout the nation.

I. THIS COURT GRANTED *CERTIORARI* ON ESSENTIALLY THE SAME QUESTION IN *HOLMES v. SECURITIES INVESTOR PROTECTION CORP.*; BUT, OVER THE OBJECTION OF FOUR JUSTICES, DID NOT REACH IT.

In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311 (1992), this Court granted *certiorari* in order to decide whether a plaintiff, who alleged a civil RICO claim based on predicate acts of securities fraud, needed to satisfy the standing requirement of the securities laws in order to have standing to bring the RICO claim:

> *Whether a party which was neither a purchaser or seller of securities, and for that reason lacked standing to sue under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, is free of that limitation on standing when presenting essentially the same claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO").*

Holmes, 503 U.S. at 265, n.7

The securities standing requirement at issue was the purchaser-seller limitation of Rule 10b-5, 17 C.F.R.240.10b-5 (1992), promulgated under section 10(b) of the Securities and Exchange Act of 1934.

Holmes involved broker-dealers who were rendered incapable of meeting their obligations to customers as a result of a stock manipulation scheme committed by defendants. The Securities Investor Protection Corporation ("SIPC") was statutorily required to then reimburse the customers for their losses. Defendants argued that the SIPC, who was neither a purchaser not seller of the securities, could not pursue a RICO action because it lacked standing to pursue the alleged predicate acts of securities fraud.

The district court agreed with the defendants, but the Ninth Circuit reversed, *Securities Investment Protection Corp., v. Vigman*, 908 F.2d 1461, 1465-1467 (9th Cir. 1990), following the Eleventh Circuit's opinion in *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987). The Ninth Circuit's decision was contrary to the decisions of two other Circuits — *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 151-154 (4th Cir. 1987) and *Brannan v. Eisenstein*, 804 F.2d 1041, 1046 (8th Cir. 1986) — and this Court granted *certiorari*, presumably to resolve the conflict.

Rather than deciding whether the plaintiff need satisfy the standing requirements of the underlying predicate acts, however, this Court held that the SIPC could not sustain a RICO claim because it was not proximately injured by the alleged racketeering conduct. As a subrogee of the defrauded customers, this Court rejected SIPC's RICO claims as "too remote," and expressed concern that the SIPC seemed to step out of nowhere. *Id.* at 268-274.

Over the objection of four concurring Justices, the *Holmes* Court stated it was an "inopportune" time to resolve whether a civil RICO plaintiff is also required to satisfy the standing requirements of the underlying predicate act. *Id.* at 276. The post-*Holmes* confusion that has occurred subsequent to the decision, partially exemplified by the Seventh Circuit's decision in this case, demonstrates that now is an opportune time to finally answer the question initially presented in *Holmes.*

II. THE POSITION ADOPTED BY THE SEVENTH CIRCUIT IS INCONSISTENT WITH THE PLAIN LANGUAGE OF THE RICO STATUTE, AND WAS EXPRESSLY REJECTED BY THREE CONCURRING JUSTICES IN *HOLMES.*

Justice O'Connor filed an opinion in *Holmes* in which she concurred with part of the majority opinion and concurred in the judgment. *Id.* at 276 (O'Connor, J., concurring). Justice Stevens and Justice White joined in Justice O'Connor's concurrence. These three concurring Justices agreed with the majority that proximate cause is an element of RICO and that the SIPC failed to satisfy the requirement. These Justices disagreed, however, with the majority's decision to postpone resolving the standing question upon which the Court granted *certiorari*. *Id.* These three Justices would have resolved the question by holding that a "plaintiff need not be a purchaser or a seller to assert RICO claims predicated on violations of fraud in the sale of securities." *Id.* at 276-77. Thus, the Seventh Circuit's opinion is directly contrary to the opinion of at least three Justices of this Court, and a majority of the Justices who chose to address the double standing issue.

Justice O'Connor's concurrence was based on an in-depth

textual analysis of RICO, a determination that the rationale behind the standing limitation imposed in securities cases by *Blue Chip Stamps v. Manor Drug Strores*, 421 U.S. 723 (1975), did not extend to RICO, and a judicial deference to Congress' right to draft statutes.

RICO was enacted as Title IX, "Racketeer Influenced and Corrupt Organizations" of the Organized Crime Control Act of 1970. Pub. L. No. 91-452 (codified as amended at 18 U.S.C. §§ 1961-1968 (1988). RICO has both a criminal and civil element. The private cause of action that constitutes civil RICO is defined in section 1964(c) of title 18 to the United States Code, which provides:

> *Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover three-fold the damages he sustains and the cost of the suit, including a reasonable attorneys fee. 18 U.S.C. § 1964(c).*

Viewing this text as the "obvious" starting point for analysis, Justice O'Connor concluded that "RICO's civil suit provision, considered on its face, has no purchaser/seller standing requirement." *Id.* at 278. The same analysis applies in this case, RICO's civil suit provision, considered on its face, does not require that a RICO plaintiff be the recipient of the fraudulent mailings, nor does it exclude business competitors. In both cases, "the statute sweeps broadly, authorizing 'any person' who is injured by reason of a RICO violation to sue." *Id.* at 278-79. "Insofar as 'any' encompasses 'all,' the words 'any person' cannot be reasonably read to mean only purchasers or sellers." *Id.* at 279.

Likewise, "any person" cannot be read to mean only the recipients of the mailing. "As was noted in *Sedima*, where the

Court rejected previous efforts to narrow the scope of RICO, "i[f] the defendant engages in a pattern of racketeering activity in a manner forbidden by [§1962's] provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under §1964(c). There is no room in the statutory language for an additional ... requirement." *Id.*, quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985). See also, *United States v. Turkette*, 452 U.S. 576, 587, 101 S.Ct. 2524, 2530 (1981)(courts are "without authority to restrict the application of RICO" beyond its statutory language); G. Richard Straffer, *Civil RICO in the Public Interest: 'Everybody's Darling,'* 19 AM. CRIM. L. REV. 655, 681 (1982)(RICO, by its express language, creates "an unrestricted grant of standing to all persons who can allege an injury to business or property resulting from a RICO violation").

Justice O'Connor then rejected the argument adopted by the Seventh Circuit in this case: that "§1964(c) incorporates the standing requirements of the predicate acts alleged." *Holmes*, 503 U.S. at 280 (O'Connor, J., concurring). Justice O'Connor noted that §1964 focuses on the injury to the plaintiffs, not on the standing requirements of the predicate acts. *Id.* She reasoned that "[i]f standing were to be determined by reference to the predicate offenses, a private RICO plaintiff could not allege as predicates many of the acts that constitute the definition of racketeering activity" because the great majority of such acts are criminal offenses for which only state or federal officials could bring suit. *Id.* Indeed, this argument applies with even more force in the context of mail and wire fraud because, unlike securities fraud, there is not even an implied private cause of action under those statutes. See, *e.g.*, *Ryan v. Ohio Edison Co.*, 611 F.2d 1170, 1178-1179 (6th Cir. 1979)(mail fraud); *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F.2d 634, 636 (5th Cir. 1974)(wire

fraud), cert. denied, 423 U.S. 837 (1975).

As pointed out above, the civil provision of the RICO statute, considered on its face, is quite expansive in allowing "any person injured in his business or property" by a RICO violation to sue. 18 U.S.C. §1964(c). Although both the Congress and the Supreme Court have expressed concern about the number of civil RICO claims being brought, the Congress has not formally acted to reduce the field of potential civil RICO plaintiffs by tying the availability of civil RICO actions to the protected classes of the predicate offenses that permit civil RICO actions. Had Congress wanted to limit RICO standing to those with standing under the predicate acts, it could have very easily done so. Where Congress includes or omits limiting language in a bill, it is presumed it did so intentionally. *Turkette*, 452 U.S. at 581. Had Congress wanted to impose additional standing limitations on RICO, it had only to add appropriate language. *Id.*

Justice O'Connor's concurring opinion recognizes that the judiciary should not act to limit potential civil RICO plaintiffs where the Congress has, for better or worse, refused to take such action. By undertaking such a limitation in the absence of any Congressional directive, the Courts would be effectively usurping Congressional authority as conferred upon it by the Constitution.

Refusing to engage in such wholesale judicial activism, Justices O'Connor, White and Stevens, therefore, flatly rejected the double-standing limitation, concluding that the "any person injured by reason of" language in §1964 does not "envision an overlay of the standing requirements from the predicate acts." *Holmes,* 503 U.S. at 280.

III. THE LEGISLATIVE HISTORY OF RICO DEMONSTRATES THAT THE SEVENTH CIRCUIT MISAPPLIED THE "ZONE OF INTERESTS" TEST IT SOUGHT TO FOLLOW.

Justice Scalia filed his own separate concurring opinion in *Holmes*, in which he agreed with the judgment of the majority: that the SIPC failed to establish proximate cause. *Holmes*, 503 U.S. at 286 (Scalia, J., concurring). Moreover, like Justice O'Connor, Justice Scalia agreed that the Court ought "reach rather than avoid the question on which [it] granted *certiorari*." *Id.* Also like Justice O'Connor, Justice Scalia rejected superimposing 10b-5's standing requirements over a §1964(c) RICO claim. Justice Scalia, however, would have reached the conclusion for "somewhat different reasons." *Id.*

Justice Scalia's opinion was based on a 'zone of interests' theory, under which in order to maintain a RICO claim the plaintiff must fall within the "class of persons sought to be benefited by the provision at issue." *Id.* at 287. Justice Scalia conceptualized the zone of interest test as varying according to the nature of the underlying predicate offenses. To use Justice Scalia's example, those within the zone of interests of the prohibition against sports bribery may be different than those within the zone of interests of the law against transporting stolen property. *Id.* at 288.

At the most fundamental level, a plaintiff will not be within a statute's zone-of-interests when the "plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it can not reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Industry Assoc.*, 479 U.S. 388, 399, 107 S. Ct. 750, 93 L. Ed.2d 757 (1987). At this level, the test screens out only

the most "absurd" of cases. Justice Scalia's example of a "stockholder who suffered a heart attack upon reading a false earnings report [seeking] to recover his medical expenses" *Holmes*, 503 U.S. at 288, is illustrative of a plaintiff who fails such an application of the zone of interests test. It cannot reasonably be said that ITAS fails the test at this most basic level. Clearly, ITAS' interest in not suffering lost business opportunities from its competitor's mail and wire fraud, is not inconsistent with or "so marginally related to" RICO as to preclude a suit.

There is, however, a more sophisticated view of zone of interests, under which the test is viewed as one of the "prudential principles that bear on the question of standing." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982). This appears to be the way Justice Scalia applied test in *Holmes*, and it must be assumed that it is also how the Seventh Circuit attempted to apply the test in this case.

As Justice Scalia noted in *Holmes*, zone of interests as a "standing concept" is closely related to proximate cause; but, entails a different inquiry. In this regard, both zone of interests and proximate cause examine the connection (or nexus) between the alleged violation and the alleged injury, but they do so in different ways. Proximate cause examines the connection in terms of speculativeness or attenuation; zone of interests, in contrast, examines the connection at a more conceptual level, i.e., is the injury alleged of the "type" or "character" intended by those who created the provision at issue. See, *e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 472 (1992) (Scalia, J., dissenting). At this more conceptual level, the principle requirement of the test is that the plaintiff "establish that the injury he complains of (his aggrievement, or

the adverse effect upon him) falls within the zone of interests' sought to be protected by the statute whose violation forms the legal basis for his complaint." *Id.* at 469.

The usual starting point for this type of zone-of-interests analysis is the text of the provision at issue. This gives rise to the question, is there statutory support for the Seventh Circuit's bold proclamation that ITAS is not within the zone of interests of the federal mail fraud statute because "only the customers are the beneficiaries of the statutory protection?" *Israel Travel,* 61 F.3d at 1258. Here, ITAS contends the answer must be no.

In *Holmes*, Justice Scalia expressed the view that the SIPC was within the zone of interests against which the securities laws are to be applied. *Holmes,* 503 U.S. at 290 ("the Court of Appeals correctly rejected the assertion that SIPC had no standing because it was not a purchaser or seller of the securities in question"). The fact that the SIPC was not a purchaser or seller did not exclude it from the zone of interests because the text of the statute contains "no hint of such limitation." Such is the case here, ITAS is not excluded from the zone of interests of the mail fraud statute simply because it was not the recipient of the fraudulent mailings — there is no hint in the mail fraud statute of such a limitation. And, there is no textual support for the proposition that only defrauded customers are the beneficiaries the protection afforded by the federal mail fraud statute.

Absent a textual basis, the only principled way the Seventh Circuit could exclude ITAS from the zone of interests is if there is a sufficient basis in the legislative history to conclude that Congress did not intend to include the plaintiff within the scope of the statutes protection.

In this case, ITAS' complaint was that Defendants

siphoned away business opportunities and profits by engaging in a pattern of mail and wire fraud that deceived prospective customers into traveling with Defendants instead of ITAS. The harm to Plaintiff, therefore, is one of "competitive injury." Competitive injury has been defined as "any kind of injury resulting from a competitive advantage gained by the RICO violator through resort to illegal business tactics." *Note -- Civil RICO the Temptation and Impropriety of Judicial Restrictions*, 95 HARV. L. REV. 1101, 1110, n. 49 (1982).

Under the zone of interests test, the dispositive question, therefore, is whether "competitive injury" is the type of harm (or aggrievement) that a RICO case predicated on mail fraud was intended to remediate. RICO's legislative history and this Court's opinion in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), would clearly suggest that the answer is "yes."

The protection of competitive interests was not only contemplated by the drafters of RICO, it was one of the primary motivations behind the statute. As Senator Hruska, one of the more active drafters of the RICO, stated:

> *In addition to [the] criminal prohibitions, the bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman. Despite the willingness of the courts to apply the Sherman Anti-Trust Act to organized crime activities, as a practical matter the legitimate businessman does not have adequate civil remedies available under that act. This bill fills that gap.*

S. 1623, 91st Cong., 1st Sess.; 115 Cong. Rec. 6995, 6993 (1969). See also, Judiciary Committee's Report to the U.S. Senate, S. Rep. No. 91-617, 91st Cong. 1st Sess. at 80-81 (1969)("what is ultimately at stake is not only the security of

individuals and their property, but also the viability of the free enterprise system itself").

In fact, prior to *Sedima*, some courts even tried to limit RICO solely to cases where competitive injury was involved. See, *e.g.*, *North Barrington Development, Inc. v. Fanslow*, 547 F. Supp. 207 (N.D. Ill. 1980). These courts were concerned with what they perceived as an inappropriate use of RICO to seek remedies for so-called "garden-variety fraud" against legitimate businesses. Although nothing in the statutory language or legislative history prevented such a use of RICO, these courts, as did the Seventh Circuit in this case, struggled to narrow the scope of civil RICO in such cases. In this quest, these courts injected a variety of restrictive components into RICO that restricted the availability of a cause of action under 1964(c).

Typically, these restrictions were modeled after the antitrust laws, and some pre-*Sedima* courts, by analogy, imputed to RICO various standing requirements akin to those used in antitrust cases. These standing requirements eventually evolved into what became known as a "racketeering injury" requirement — *i.e.*, that something more than an injury following from the predicate acts of racketeering was necessary to sustain a civil RICO action.[3]

In *Sedima*, the Second Circuit assumed that the "by reason of" language in the statute evidenced a legislative intent to erect standing barriers similar to those in the antitrust context that

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[3] In addition to imposing these standing requirements, courts made other efforts to limit RICO's scope. On approach was to require a link to organized crime; another approach was to require that a defendant be convicted of a predicate act before a civil RICO cause of action could be sustained.

required a showing of competitive injury. Under this view, standing in civil RICO was limited to plaintiffs who alleged a "racketeering injury" — an "injury different in kind from that occurring as a result of the predicate acts themselves." *Sedima*, 741 F.2d 482, 496 (2d Cir, 1984), rev'd 473 U.S. 479 (1985).

This Court reversed. In the *Sedima* decision, this Court held that a civil RICO plaintiff need not allege any injury "separate from the harm of the predicate acts," 473 U.S. at 495, thereby rejecting the "racketeering injury" requirement posited by some federal courts. In so doing, the Court stressed the plain meaning of RICO's statutory language, stating that "[a] reading of the statute belies any such [racketeering injury] requirement." *Id.* at 495. This Court found further support in the statute's legislative history and liberal construction clause. *Id* at 497-98.

Justice Marshall dissented. He was joined in his dissenting opinion by Justices Brennan, Blackmun and Powell. The dissenting Justices believed that the Second Circuit was correct, and that RICO should be limited to those cases where the plaintiff suffers a "racketeering injury," of which competitive injury was a subset. This conclusion was based on an extensive examination of the legislative history, from which the dissenters concluded:

> *Congress intended to give to businessmen who might otherwise have had no available remedy a possible way to recover damages for competitive injury, infiltration injury, or other economic injury resulting out of, but wholly distinct from, the predicate acts. Congress fully recognized that racketeers do not engage in predicate acts as ends in themselves; instead, racketeers threaten, burn, and murder in order to induce their victims to act in a way that*

> *accrues to the economic benefit of the racketeer, as by ceasing to compete, or agreeing to make certain purchases. Congress' concern was not for the direct victims of the racketeers' acts, whom state and federal laws already protected, but for the competitors and investors whose business interests are harmed or destroyed by racketeers, or whose competitive positions decline because of infiltration in the relevant market. . . . Indeed, that is why Congress provided for recovery only for injury to business or property -- that is, commercial injuries -- and not for personal or emotional injury.*

Sedima, 473 U.S. at 519 (Marshall, J., dissenting).

The majority did not deny that competitive injury should be included within RICO's scope; rather, it opted for an even more expansive interpretation, stating: "[a]ny recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicated acts . . . [and] such damages include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery. *Id.* at 497 & n.15.

The essential point here is that while some jurists wanted to limit RICO to "competitive" or "racketeering" type injuries, virtually all jurists acknowledged that those injuries were within RICO's intended zone of interests.

As the above analysis shows, ITAS falls within the zone of interests of RICO, predicated on mail fraud. However, even if ITAS did not fall within the zone of interests, *certiorari* would still be justified because it is not clear that the zone of interests, as applied in this context, has the backing of the entire Court. As it stands now, this test is the view of one concurring Justice,

and a view with which three other Justices appeared to disagree. Absent a more definitive pronouncement from this Court, including some guidance as to how "zone of interests" is defined, exclusion from the zone of interests may not even be a valid basis for denying a plaintiff standing under RICO.

IV. THE DOUBLE STANDING REQUIREMENT IMPOSED BY THE SEVENTH CIRCUIT HAS RESULTED IN A SPLIT IN THE CIRCUITS

Although the Seventh Circuit denies it, its decision in his case has resulted in a split in the federal Circuits. There is no way to reconcile the Seventh Circuit's decision in this case with the Fourth Circuit's decision in *Mid Atlantic Telecom v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir. 1994). In an important well-reasoned decision, the Court in *Mid-Atlantic* held that one competitor can proceed under RICO against another competitor for mail and wire fraud directed against customers and potential customers where the customers are being used as pawns in the overall scheme to harm the plaintiff.

In *Mid-Atlantic*, both the plaintiff and defendant competed as resellers of long-distance services. LDS programmed its computer to alter the customer billing program to add time to the duration of long-distance telephone calls, thereby increasing call duration and increasing the phone bill to the customers who were unknowingly paying more for the services than they had contracted to pay. *Id.* at 260-262 The plaintiff, Mid-Atlantic, argued that the additional revenues generated by this billing scheme enabled LDS to give potential customers ostensibly lower rates than those charged by other resellers, such as the plaintiff, since any "lower rates" were recouped by the additional charges billed by inflating the duration of its customers' telephone calls recorded on the bills. Mid-Atlantic

further argued that the extra revenue generated by LDS' fraudulent practice provided LDS with the revenues to offer its services to clients of Mid-Atlantic at "special low rates," below the prevailing market rates and below the rates customarily charged by LDS, in order to induce those customers to switch to LDS. *Id.* As the Fourth Circuit explained, "Mid Atlantic alleges that LDS engaged in fraudulent use of the mails and telephone wires to entice customers away from Mid Atlantic and to eliminate Mid Atlantic as a competitor [thus violating RICO]." *Id.* at 263.

This case presented precisely the same situation, in which IIT used mail and wire fraud to entice customers away from ITAS in an attempt to eliminate ITAS as a competitor. The Fourth Circuit explained that *Holmes* does not preclude a RICO claim in such a situation, reasoning:

> *Mid Atlantic is not seeking to vindicate the rights of its former customers who may have been offered fraudulently low rates. Furthermore, Mid Atlantic's injuries, as alleged, are not derivative of any losses suffered by its former customers. Rather, it claims distinct and independent injuries: lost customers and lost revenue due to the necessity of offering lower rates to match LDS's fraudulent ones.*
> Id. at 264.

See also, *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1067 (3rd Cir. 1988)(holding that one competitor has standing to file a civil RICO claim against another competitor as a result of defendant's fraud on the government resulting in a losing bid).

There is no way to reconcile the Seventh Circuit's opinion with the Fourth Circuit's opinion in *Mid-Atlantic* or the Third Circuit's in *Environmental Tectonics.* If, as the Seventh Circuit held, only the customers are the beneficiaries of protection of the mail fraud statute, and if competitors cannot use RICO predicated on mail fraud to vindicate competitive rights, then Mid-Atlantic does not have a cause of action. If Mid-Atlantic brought its claim in the Seventh Circuit, as opposed to the Fourth Circuit, it would have lost. ITAS respectfully requests this Court grant this Petition and resolve the split in the Circuits on this important issue.

CONCLUSION

Wherefore, the Plaintiff-Petitioners respectfully request that this Court grant this Petition for Certiorari, and eliminate the judicially activist and improper double standing requirement imposed by the Seventh Circuit by reversing the grant of summary judgment in favor of Defendants and remanding for a new trial on Plaintiff's RICO claims.

Respectfully Submitted,
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Petitioner,

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Dated: January 11, 1996

APPENDIX A

ISRAEL TRAVEL ADVISORY SERVICE, INC., CELIA SHAR, AND MARILYN ZIEMKE, *Plaintiffs-Appellants, Cross-Appellees,*

v.

ISRAEL IDENTITY TOURS, INC., LARRY RITTER, AND MARLENE RITTER, *Defendants-Appellees, Cross-Appellants.*

Nos. 94-1451, 94-1554, 94-1815 & 94-1816

United States Court of Appeals, For the Seventh Circuit

January 9, 1995, Argued
July 20, 1995, Decided

Peter C. Woodford, Daniel J. Voelker (Argued), Christopher V. Langone, Seyfarth, Shaw Fairweather & Geraldson, Chicago, IL, for Israel Travel Advisory Service, Incorporated, a New Jersey Corporation.

David A. Axelrod (argued), Lori F. Chacos, Schoenberg, Fisher & Newman, Chicago, IL, for Israel Identity Tours, Incorporated, a New Jersey corporation, Larry Ritter, a New Jersey resident, and Marlene Ritter, a New Jersey resident.

Before FLAUM and EASTERBROOK, Circuit Judges, and PAINE, District Judge.[1]

EASTERBROOK, Circuit Judge.

Bar mitzvah tours of Israel. That is the market defined for the antitrust claim in this case. It is an absurd market

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[1] Hon. James C. Paine, of the Southern District of Florida, sitting by designation.

definition. For a market is defined to aid in identifying any ability to raise price by curtailing output. *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1335-37 (7th Cir. 1986). These litigants do not own or control the assets that produce output in a travel market: fleets of airplanes, chains of hotels, Israel and its history. Anyone can buy tickets, rent rooms, and conduct tours. If these firms were to vanish tomorrow production would be unaffected. Their principal assets—skills as marketers and guides—would survive. People rather than firms hold expertise (economists call it "human capital" for good reason), and they can change affiliation. Output often grows in the process as competition intensifies. That is not only an economic theory but also the genesis of this case. Israel Travel Advisory Service (ITAS) specializes in bar and bat mitzvah tours of Israel. Families tour historical sites, with a celebration arranged at a place of religious significance. Israel Identity Tours (IIT), founded by disaffected employees of ITAS, began vigorous competition. ITAS remains the larger firm and has increased its sales consistently—though ITAS accuses IIT of monopolization!—but begrudges IIT even a single customer. The competition, like the litigation, is marred by charges of deception and defamation. We have a spite match, and as in many such contests the parties have raised every imaginable claim and others that exceed the bounds of imagination. To make this opinion tractable, we simplify greatly.

Celia Shar and Marilyn Ziemke founded ITAS in 1970. Parents who want to arrange religious celebrations for their children in Israel as part of a package tour are a select market, and ITAS (like its rivals) is an in-home operation. Shar and Ziemke recruited experienced guides in Israel; they relied on a combination of ads and word of-mouth to obtain clients in the United States. The best promoters are persons well known and respected in the Jewish community. Ilene Wallerstein

represented ITAS in Chicago, and by all accounts she was successful in obtaining business. Eventually she had a falling-out with Shar and Ziemke. Wallerstein quit in 1990 and set up a rival in Illinois; Karen Kaplan, ITAS's sales representative in Boston, also quit. Ami Ben Geller, one of ITAS's former tour leaders in Israel, persuaded his friend Larry Ritter to set up a bar mitzvah travel service in New Jersey. Geller agreed to be the guide; Transglobal Travel, ITAS's former land facilitator in Israel, also switched allegiances. The IIT in the caption of this case is Larry Ritter's operation; Wallerstein's firm, incorporated in Illinois, used the identical name (which to reduce confusion we call IIT-Illinois). Wallerstein, Kaplan, and Ritter cooperated, and their ads implied that the two corporations are a single firm. One of the issues in the case is how close that cooperation became.

Ilene Wallerstein began to slander ITAS, telling potential customers that it was on the verge of bankruptcy—a serious charge, because travelers do not want to hand over thousands of dollars to a firm that may furnish a chose in action rather than travel. Being stranded with worthless vouchers is no one's idea of a good trip. ITAS sued IIT-Illinois and Wallerstein, who settled. But if IIT was a joint venture or conspirator with IIT-Illinois, then IIT is jointly liable for Wallerstein's words. ITAS has numerous other gripes. Ads for IIT trumpeted 33 years' experience; ITAS says that this is a lie because IIT had just commenced business, while IIT says that the number referred to Geller's long experience as a guide, although one of the ads did not name Geller. IIT implied that Joel Leibowitz was affiliated with the firm, which ITAS says he was not. ITAS also wants to hold IIT liable for disparaging comments Leibowitz made, on the theory that he had apparent if not actual authority to represent IIT. When ITAS began to offer a "free" tour of Israel to the bar or bat mitzvah celebrant, IIT responded by advertising "free" tours of its own; ITAS

believes that these ads and corresponding oral statements to potential customers were false, or at least misleading, because IIT offered only "free" land arrangements, while ITAS included air fare too. (We put "free" in quotations because neither firm offered anything for free; money from the sale of travel arrangements to the celebrants' parents and siblings covered the costs.) Then there is a claim that Marlene Ritter, Larry's wife, told one potential customer that ITAS and IIT are "the same thing." All of this, according to ITAS, violated the common law of defamation and unfair competition, consumer protection laws in Illinois and New Jersey, the Sherman Antitrust Act, the Lanham Trademark Act, and the Racketeer Influenced and Corrupt Organizations Act (RICO). For its part, IIT filed a counterclaim seeking relief on nine theories.

The district court carved several claims and parties from the case by partial summary judgment. What was left was tried to a jury—although the judge resolved some additional claims in mid-trial under Fed. R. Civ. P. 50. The jury concluded that IIT (but not Larry Ritter) had slandered ITAS. It awarded $75,000 in compensatory and $ 102,945 in punitive damages for this tort. The jury rejected every other claim presented to it, and the judge rejected all efforts to upset the verdict. 1994 U.S. Dist. LEXIS 751. Now we have cross-appeals. IIT believes that it should have prevailed on the defamation theory and counterclaims, while ITAS thinks that it is entitled to a larger recovery, and from the Ritters personally as well as from their corporation. We start with IIT's argument that it should be ITAS's judgment creditor rather than its judgment debtor.

Wallerstein made the defamatory remarks that led to this verdict. IIT could be responsible for them only if the two IITs were joint adventurers. Firms do not act by themselves; people are responsible for their deeds, so IIT could be responsible only if Larry or Marlene Ritter made common cause with Wallerstein. The district judge granted summary

judgment in Marlene's favor, and the jury ruled in Larry's. Yet if neither Ritter was responsible, how can IIT, whose liability is vicarious, be responsible? How can a corporation be ordered to pay punitive damages when no natural person has committed a tort? Perhaps IIT's liability depends exclusively on Leibowitz's statements, but these would be slender support for a verdict of the size the jury returned. Perhaps the jury's verdicts are simply inconsistent. As it happens, IIT did not point out the inconsistency to the district judge, and it has not argued to us that the jury's absolution of Larry Ritter calls for a new trial—the right way to deal with such problems, for neither of the inconsistent verdicts has priority. *American Casualty Co. v. B. Cianciolo, Inc.*, 987 F.2d 1302, 1305 (7th Cir. 1993). We do not invent arguments for the parties in civil litigation and therefore pass to the contentions IIT presses.

What IIT does argue is that it lacked an adequate opportunity to develop its defense. It wanted to take depositions of Shar and Ziemke, ITAS's principals. The district court refused to compel Shar and Ziemke to attend the depositions IIT noticed, a step that IIT believes entitles it to another trial. We don't see why. Harmless errors do not vitiate verdicts, and IIT does not explain how the lack of discovery injured it. It does not say that any surprising evidence came out at trial or that depositions would have assisted in the exploration of a material issue or influenced trial strategy. At all events, the district court did not err. The discovery cutoff was March 15, 1993. Having twice extended this date, the district judge told the parties that she would not do so a third time. On March 3, 1993, IIT mailed four notices of deposition; ITAS received them on March 8. They called for the deposition of Shar and Ziemke in Chicago on March 11 and 12; IIT wanted to take depositions of other witnesses in New Jersey on the same dates. Before mailing these notices, IIT had received ITAS's notices of third-party depositions for upstate New York on March 11

and 12. It cannot have come as much surprise to IIT that the judge refused to compel ITAS's lead counsel to rearrange his schedule—or to be in three places at once—when IIT had waited until the end of discovery to schedule the depositions of its adversaries. ITAS had offered to make Shar and Ziemke available earlier, but IIT was not interested. The district court did not commit clear error; to the contrary, her decision was clearly correct.

Gamesmanship had greater costs for IIT. Throughout discovery IIT was less than forthcoming in producing documents ITAS sought. Three times the district judge granted ITAS's motions to compel. The judge characterized IIT's conduct as "continued testing of the bounds of permissible discovery," 1993 U.S. Dist. LEXIS 7433, * 2, followed by conduct beyond permissible bounds—flouting the court's orders. The court directed IIT to produce certain documents, which counsel said they could not find, only to be embarrassed by Larry Ritter's admissions (a) that counsel had never asked him to locate the documents, and (b) that he had destroyed pertinent documents, including correspondence with Wallerstein, after ITAS had filed motions to compel. The judge also ordered IIT to produce all financial records by February 13, 1993, on pain of default judgment. On March 3, 1993, ITAS took the deposition of IIT's accountant, who revealed that certain financial records had been prepared and given to IIT. (In fairness to IIT's current lawyers, we add that IIT changed counsel after these episodes.) When ITAS found that these had not been produced, it moved for sanctions. Instead of following through on her threat to write finis to the whole case, as she could have done, see Fed. R. Civ. P. 37(b)(2)(C), the judge chose a milder sanction: she dismissed IIT's counterclaims. 1993 U.S. Dist. LEXIS 4435. On the counterclaims IIT was the plaintiff, and a plaintiff who does not cooperate in discovery must expect to lose. *Otis v. Chicago*, 29 F.3d 1159, 1168 (7th

Cir. 1994) (*en banc*); *Newman v. Metropolitan Pier & Exposition Authority*, 962 F.2d 589 (7th Cir. 1992); *Metropolitan Life Insurance Co. v. Cammon*, 929 F.2d 1220 (7th Cir. 1991).

Our review is deferential, and the judge did not abuse her discretion. The judge gave ample warning, and the sanction was proportional to the wrong. See *United States v. Golden Elevator, Inc.*, 27 F.3d 301 (7th Cir. 1994); *Ball v. Chicago*, 2 F.3d 752 (7th Cir. 1993). IIT proffered excuses, but the judge did not have to accept them. Ordered to disclose "all corporate records," IIT did not turn over its checking account records. Why, nothing in the order mentioned checks, it contends. Come, come. A lawyer who makes such an argument can't expect anything else he says in the litigation to be believed.

We have dropped a discussion of the counterclaims into the midst of assessing IIT's request for a new trial because Ritter's destruction of documents influences another of IIT's contentions: that the evidence does not show that Ritter and Wallerstein were in league against ITAS. Destruction of evidence can support a contrary inference, and there was more. Larry Ritter told his friends that the only reason he was in the travel business was to destroy ITAS. Wanting harm, even bankruptcy, to come to one's business rivals is not actionable; hatred is a spur to competition, which serves consumers' interests. Entrepreneurs are privileged to compete because any effort to separate pure from impure motives would in the end undercut the power of rivalry to promote consumers' welfare. See, Oliver Wendell Holmes, *Privilege, Malice & Intent*, 8 HARV. L. REV. 1 (1894), reprinted in 3 *Collected Works of Justice Holmes* 371, 373-74 (Sheldon M. Novick ed. 1995). Although the motive for going into business is not actionable, the mind may illuminate the means, may disambiguate borderline practices. ITAS's theory is that Ritter engaged in cooperative advertising with Wallerstein and referred potential

clients to her for advice, knowing that she would impugn ITAS's solvency, to the advantage of both IIT firms. Several customers testified to both the referrals and the defamation. Perhaps they were stretching matters; or perhaps, as IIT argued, ITAS really was in financial straits, but the jury could credit these witnesses and accept the inferences ITAS pressed. Pace IIT, that we review without deference the district judge's decision refusing to grant judgment as a matter of law does not imply that we review the evidence *de novo*. The question for a court of appeals is whether a reasonable juror could find the evidence sufficient under a preponderance standard. *Mayer v. Gary Partners & Co.*, 29 F.3d 330 (7th Cir. 1994). The answer is yes.

As for damages: general damages were permissible, and the award of $75,000 was proper under the circumstances. A reasonable jury could conclude that the defamatory statements misled some travelers, inducing them to use IIT when, with correct information, they would have used ITAS. Quantifying the loss was exceedingly difficult; how does ITAS prove a counterfactual proposition about the behavior of persons who bought IIT's services? ITAS was able to prove that lies had been told, but the extent of their effect was bound to be problematic. That's why general damages are available in the law of defamation. See *Prosser & Keeton on Torts* 791 & n.80, 843 (5th ed. 1984). IIT stresses that all of the witnesses at trial eventually got their facts straight and used ITAS's services, but this says more about the way parties find witnesses in litigation than about the effects of the slander. The people most likely to report to ITAS that they had been told unpleasant things by IIT are the ones who doubted IIT's statements and sought more information; the ones taken in would not have come to ITAS's attention. The evidence did enough to demonstrate malice that punitive damages were available. The ratio of punitive to actual damages is not excessive, and IIT's slim net worth did not

preclude the award. A large net worth is a bad reason to award punitive damages, *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508-09 (7th Cir. 1992), and a small net worth is a bad reason to let the wrongdoer off the hook.

ITAS believes that it is entitled to more than the jury awarded. It invokes two statutes, RICO and the Sherman Act, that provide for treble damages and attorneys' fees. The district judge granted summary judgment to IIT on the RICO claim, and it threw out the antitrust claim at the close of ITAS's case. The latter decision is obviously correct. We have explained already what is wrong with ITAS's market definition—and, if "bar mitzvah tours of Israel by families who live in New Jersey or near Chicago or Boston" (the full "definition") were indeed a market, then the dominant firm would be ITAS itself, a monopolist by its own admission until 1990. IIT's entry upset the larger firm, but the antitrust laws encourage such upsets. It is an abuse of the antitrust laws to invoke them to stifle nascent competition. *Stamatakis Industries, Inc. v. King*, 965 F.2d 469 (7th Cir. 1992). Although ITAS believes that IIT's "free" land tours for celebrants amounted to predatory pricing because IIT lost money, it has not begun to satisfy the requirements of a predatory-pricing case. Chief among these is the need to show that the "victor" in the price war can recoup its losses by charging supracompetitive prices. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989). Unless the "predator" can recoup, consumers are net beneficiaries. IIT has not achieved a dominant position in the market (ITAS remains much larger), and because rivals could freely enter if IIT drove out ITAS, recoupment would be impossible. So if IIT indeed charged less than its costs, there is no reason to get excited; IIT was giving

money away to consumers rather than injuring them by curtailing output and charging monopoly prices. *Cf. Spectrum Sports, Inc. v. McQuillan*, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993) ("dangerous probability of success" is an essential element in a § 2 case). More likely it was discounting to get established in the market, also a lawful step, see Phillip Areeda & Donald F. Turner, 3 *Antitrust Law* ¶ 716 (1978), but we need not pursue the subject.

Some antitrust offenses do not depend on proof of market power. Price fixing and market allocation, for example, are illegal *per se* whether or not the firms have any hope of success. *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 112 L. Ed. 2d 349, 111 S. Ct. 401 (1990); *FTC v. Superior Court Trial Lawyers*, 493 U.S. 411, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990); *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995); 15 U.S.C. § 1. Let us suppose that IIT and IIT-Illinois conspired to fix prices. How does this injure ITAS? If the IIT firms raised their price (the concern with price fixing), then ITAS would have been the beneficiary and could raise its own prices. Acts harmful to business rivals generally help consumers; this fact is the basis of the antitrust injury rule of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977). A merger unlawful because of its tendency to increase prices aids rivals; conversely, a claim by the rival of the merged firms that the merger has intensified competition shows how the rival suffers injury, but not how consumers lose. Such a rival has actual injury but does not suffer from the effect that makes the transaction unlawful under the antitrust laws and therefore, Brunswick held, cannot invoke the antitrust laws. See also *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986); *Chicago Professional Sports Limited Partnership v. National Basketball Ass'n*, 961 F.2d 667, 670 (7th Cir. 1992); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989); *Zinser v.*

Rose, 868 F.2d 938 (7th Cir. 1989). We know from *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990), that the antitrust injury doctrine applies with full vigor to the *per se* offenses. ITAS cannot show how price fixing by the two IITs injured both producers and consumers. As we held in Stamatakis, the antitrust injury doctrine KOs claims based on injury caused by defecting employees who set up rivals. This antitrust claim was stillborn, and the district judge's only error was waiting as long as she did to scotch it.

The RICO claim is more substantial. The district judge granted summary judgment against ITAS because the predicate offenses, mail fraud, involved consumers rather than ITAS itself. The judge believed that indirect injury is insufficient after *Holmes v. SIPC*, 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992). 1993 U.S. Dist. LEXIS 6141, rehearing denied, 1993 U.S. Dist. LEXIS 8744. Yet the Supreme Court observed, 503 U.S. at 272-73 n.20, that it did not mean to preclude all possibility of recovery for injury that was transmitted indirectly; the holding of *Holmes* is no more than that common law ideas about proximate causation inform the understanding of RICO. *Holmes* explicitly refrained from importing a theory akin to the antitrust-injury doctrine into the law of RICO. *Id.* at 269 n.15. Sometimes a recovery for a derivative injury would undermine RICO's own purposes, or those of other statutes; the Court gave as one illustration our holding in *Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333 (7th Cir. 1989), that shareholders cannot use RICO to recover for injury done to their corporation. Such a process would create unnecessary complexities in apportioning recoveries, and at the same time would undermine the interest of the corporation's creditors in collecting their debts. (The shareholders wanted to bypass the corporation precisely because it was insolvent, and its creditors would have reaped

most of the benefit.) *Holmes* dealt with a similar claim, by one of a corporation's creditors rather than an equity investor. A fraudulent scheme injured the corporation and its clients, causing the Securities Investor Protection Corp. to advance money to protect the clients. The corporation had other debts—and other sources of financial distress. The Supreme Court concluded that the clients and the injured corporation were the proper plaintiffs; whatever the corporation obtained would inure to the benefit of its creditors, including SIPC, according to their priorities in bankruptcy.

Our case does not present a similar apportionment problem, and there is no risk of multiple recoveries. The "direct" victims—as the district court understood things, the readers of IIT's ads—got what they paid for and are not complaining. *Holmes* called for the use of common-law analogies under 18 U.S.C. §1964(c), and there is no doubt that a producer injured by a campaign of misinformation directed at its customers suffers an injury compensable under the law of torts; it is not cut off by the proximate causation and foreseeability requirements. *Prosser & Keeton on Torts* at 1013-20. After giving thoughtful treatment to *Holmes*, the fourth circuit held in *Mid Atlantic Telecom Inc. v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir. 1994), that RICO similarly allows suits when the predicate offenses influence customers and, derivatively, injure business rivals. A conflict among the circuits on such a question would be regrettable, and we therefore accept *Mid Atlantic*. (The district court's alternate holding that ITAS cannot show how it relied on the misrepresentations made to its potential customers just restates the conclusion that derivative injury is never cognizable under RICO; it does not require separate analysis.)

Like a troll under the bridge, another problem lies in wait for a litigant that has come this far. An entrepreneur can

recover under the common law of unfair competition when a rival tells fibs to potential customers, because the rule against fraud has been crafted for the benefit of both seller and customer. Can one say the same about the federal mail fraud statute, 18 U.S.C. §1341, the only criminal predicate act in IIT's supposed "pattern of racketeering"? Only one court of appeals has addressed this question, and it answered "no." *Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397, 405-06 (9th Cir. 1991). *Lancaster Community Hospital* held that business rivals may not use RICO to complain about injuries derivatively caused by mail frauds perpetrated against customers, because only the customers are the beneficiaries of the statutory protection. We are no more inclined to create a conflict on this question than we were on the *Mid Atlantic* issue—especially not after *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1327 (7th Cir. 1994), indicated tentative agreement with *Lancaster Community Hospital*. Tentative now becomes definitive. *Lancaster Community Hospital* relied in part on *McNally v. United States*, 483 U.S. 350, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987), which jettisoned the intangible rights doctrine in mail fraud cases. The ninth circuit thought that preservation of market share is an intangible right outside the scope of §1341. Congress has reinstated the intangible rights approach, 18 U.S.C. §1346, but we do not think that this changes anything. Lost business opportunities, the subject of both *Lancaster Community Hospital* and this case, are property as §1341 used that term before the amendment. See *Carpenter v. United States*, 484 U.S. 19, 98 L. Ed. 2d 275, 108 S. Ct. 316 (1987). The essential point, rather, is that the victims of the fraud are the object of solicitude; §1341 does not establish a regimen of truth-telling without regard to details like who is losing out and why. *See United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993).

Such a limitation is common in tort law. A plaintiff

claiming injury by the defendant's violation of a statute must show not only that the defendant violated the law but also that the plaintiff is among the persons protected by the law. *Prosser & Keeton on Torts* at 225-26. Thus violation of a law requiring animals to be kept in pens on shipboard does not lead to liability if the animals are washed overboard; the function of the law was to curb disease, not to reduce the effects of storms. *Gorris v. Scott*, 9 Ex. 125 (1874). In federal administrative law, this principle is known as the "zone of interests" requirement. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 131 L. Ed. 2d 160, 115 S. Ct. 1278, 1283-84 (1995); *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 395-96, 93 L. Ed. 2d 757, 107 S. Ct. 750 (1987); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970). See also *Holmes*, 503 U.S. at 287-88 (Scalia, J., concurring). It carries over to criminal law. For example, in determining the "loss" from IIT's ad campaign under the Sentencing Guidelines (if indeed IIT committed mail fraud, a subject we do not broach), a court would not inquire how much ITAS lost; it would ask only what the travelers lost. U.S.S.G. §2F1.1 Application Note 7(a), (c); see also § 3D1.2 Application Note 2; *United States v. Marlatt*, 24 F.3d 1005 (7th Cir. 1994). So too with civil RICO now that *Holmes* has adopted common law approaches to decide when RICO authorizes recovery for derivative injuries. Section 1341 does not protect vendors to persons who may be deceived, and firms suffering derivative injury from business torts therefore must continue to rely on the common law and the Lanham Act rather than resorting to RICO.

ITAS won under the common law, and it lost under the Lanham Act. The jury decided that neither IIT nor Larry Ritter had violated that statute. The verdict drains all significance from several of ITAS's arguments. Consider, for example, the contention that Marlene Ritter should have been among the

defendants at trial. Only one accusation has been leveled against her: that she told a potential customer that ITAS and IIT are the same thing. The customer related calling the IIT business number (which is in the Ritter home) and talking with a woman. ITAS's argument depends on the fact that Marlene Ritter is the most logical woman. The district court granted summary judgment against ITAS, ruling that it had not excluded the possibility that some other woman took the call. 1993 U.S. Dist. LEXIS 6141, *16-17. Yet litigants need not surmount such a hurdle. If a reasonable juror could infer that Marlene Ritter spoke with the customer, then summary judgment was inappropriate. ITAS could meet this burden by showing that IIT lacked other female call-takers. But so what? The person who was told that ITAS and IIT are the same entity took a tour with ITAS. Proof of this incident at trial therefore could not have affected the quantum of damages, and ITAS does not argue that it needs Marlene Ritter on the judgment to improve its chances of collection. As things developed at trial—including the fact that the jury heard via deposition the tale of the customer who believes that she spoke with Marlene Ritter—the order removing her from the case was inconsequential.

So too with claims ITAS presents under the Illinois Consumer Fraud Act, 815 ILCS 505/1 to 505/11a, the Illinois Deceptive Trade Practices Act, 815 ILCS 510/1 to 510/7, and the New Jersey Consumer Fraud Act, N.J. Rev. Stat. 56:8-1 to 56:8-20. The district court removed these from the case by summary judgment. 1993 U.S. Dist. LEXIS 6141, *11-13, 1993 U.S. Dist. LEXIS 8744, * 19-28, 1994 U.S. Dist. LEXIS 751, * 11. ITAS says that this was error. Who cares? ITAS lost under the Lanham Act. The jury therefore must have believed that IIT did not make any false statement likely to cause confusion among consumers. See 15 U.S.C. §1125(a)(1). (Though commercial defamation can violate the Lanham Act,

see §1125(a)(1)(B), we reiterate the point that IIT has not asked for a new trial on account of inconsistent verdicts.) What would rephrasing the claims under the state laws have added? Throughout its lengthy briefs, ITAS never tackled this question. At oral argument ITAS argued that it is a little easier to prevail under the Illinois Consumer Fraud Act than under the Lanham Act, but it did not supply details. The place for such arguments is in the briefs; it is too late to advance them for the first time on one's feet, after the other side's submissions are in. We therefore have nothing to say about the question whether the district court should have allowed claims based on these three statutes to go to the jury.

This analysis assumes, however, that the verdict on the Lanham Act stands. ITAS wants it set aside for two reasons. First, it believes that the district judge erred in preventing Toby Katz from testifying. Second, ITAS contends that the judge should have permitted Marilyn Ziemke to relate what potential customers told her on the telephone.

Katz appeared in ITAS's witness list in the final pretrial order. According to ITAS's list, Katz was one of its employees or agents. ITAS did not provide Katz's telephone number or address, and IIT did not attempt to contact her to learn what she might say. (The telephone number was in an exhibit.) Come the trial, IIT asked the judge to forbid Katz from testifying because the omission of her address violated N.D. Ill. Rule 5.00. The judge agreed and kept Katz off the stand. 1994 U.S. Dist. LEXIS 751, *7. This mechanical application of Local Rule 5.00 is untenable under *Grove Fresh Distributors, Inc. v. New England Apple Products Co.*, 969 F.2d 552, 558-60 (7th Cir. 1992). Like many of our cases, *Grove Fresh Distributors* invokes the principle that a sanction should be proportional to the wrong. See also, *e.g.*, *Okaw Drainage District v. National Distillers & Chemical Corp.*, 882 F.2d 1241, 1248 (7th Cir. 1989). Omission of an unimportant detail, like a misspelling of

the witness's name, should not lead to the exclusion of vital evidence. The district court observed that *Grove Fresh Distributors* involved a rebuttal witness, while Katz was to testify in ITAS's case-in-chief. True, but irrelevant. The principle of proportionality is what matters, and it is applicable to all witnesses—and all sanctions. IIT had an opportunity to take Katz's deposition but declined; it is therefore difficult to see why Katz should have been prevented from testifying. Although IIT observes that ITAS's incorrect assertion that Katz was still ITAS's employee dissuaded IIT's lawyers from calling her phone number, the foregone opportunity to take her deposition cannot be so easily explained away.

ITAS believes that an error in preventing a witness from testifying entitles it to a new trial. Yet there is a harmless-error rule to reckon with. Whether the error was harmless depends on what Katz would have added to the information placed before the jury. ITAS assures us that Katz's testimony was vital. Apparently ITAS expects us to take that representation on faith, because ITAS did not make an offer of proof. Too bad for ITAS; the omission is fatal. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . in case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context". Fed. R. Evid. 103(a)(2). Beyond ITAS's assertion that Katz would have supplied "critical" testimony relevant to damages, we know nothing and therefore are in no position to conclude that the exclusion affected a substantial right. The party aggrieved by exclusion must supply details; ITAS has volunteered only rhetoric.

Ziemke's proposed testimony is less of a mystery; ITAS made a formal offer outlining the excluded testimony. Ziemke took many of the calls made to ITAS's telephone number and wanted to testify that after IIT went into business she began to

receive inquiries such as: "They're offering the same thing you're offering. What's the big deal?" and "Doesn't IIT have the same free bar mitzvah?" Ziemke added: "Practically every phone call that ITAS got in which people were comparing [ITAS] to IIT, every one of those people asked 'what's the big deal? They have the same thing you have.' " The district judge excluded this testimony as hearsay, a step that she conceded in post-trial proceedings had been a blunder. 1994 U.S. Dist. LEXIS 751, *4. ITAS offered this testimony not for its truth—to show that IIT was offering the same "free" package as ITAS—but to show that customers were confused. For that purpose it was not hearsay. Fed. R. Evid. 801(c). Evidence about what customers say to vendors is a staple of trademark and business tort litigation. *International Kennel Club of Chicago v. Mighty Star, Inc.*, 846 F.2d 1079, 1089-90 (7th Cir. 1988). Nonetheless, the district judge denied ITAS's post-trial motion, explaining that the inquiries that Ziemke would have related at trial did not show consumer confusion. Instead, the judge believed, they showed customers making inquiries to obtain information.

Informed by hindsight, we think that the evidence should have been admitted. The line the district judge drew is difficult to maintain. Perhaps the principal inference from the inquiries is that competition had begun. No longer the sole packager of bar mitzvah tours of Israel, ITAS started to receive inquiries by customers asking about the differences between available options. On this understanding, there is no problem under the Lanham Act. There is only competition, to be encouraged. Another possible inference, however, is that some of these customers were calling because they had been misled by the implication of the IIT ads that the two firms' "free" packages were identical. Ziemke explained the difference to those who called; but some travelers would have signed with IIT without calling. Drawing inferences from ambiguous events

is the province of the trier of fact, here a jury. That said, however, we do not think that the error was sufficiently grave to require a new trial. The jury was floating in evidence about IIT's representations. Jurors knew the difference between ITAS's package and IIT's and were well able to determine whether consumers would have been confused. Ziemke's testimony would have added evidence in the lists on one side, but it was so much to be expected—many calls of the kind she described in the offer of proof were inevitable even if IIT's ads had included elaborate and complete narrations—that the exclusion does not require the entire trial to be redone. Not when it is so hard to see what damages the Lanham Act (or for that matter the state consumer-protection laws) could have added to the award ITAS received for defamation. Attorneys' fees maybe, but they are hardly automatic. ITAS think that it could have collected extra money for corrective advertisements, but this misunderstands the nature of such claims. See *Zazu Designs*, 979 F.2d at 506-07. Altogether, the probable effect on the award was sufficiently small, and the probable effect on the outcome sufficiently problematic, that the error was harmless.

Only one issue remains: costs. The district judge ordered each side to bear its own. ITAS believes that this was an abuse of discretion because it prevailed. So it did, but only in part. It lost outright against Larry Ritter. Marlene Ritter won in advance of trial. The Ritters beat back ITAS's demands and therefore have a better claim for costs—although the Ritters lost their counterclaims. ITAS peppered the judge with woebegone theories, such as the antitrust claim, and pointless ones, such as the demands under the state consumer-deception laws. These took up time and IIT's money without producing anything in return. Under the circumstances, declining to shift costs was a wise decision, certainly not an abuse of discretion. *Landau & Cleary, Ltd. v. Hribar Trucking, Inc.*, 807 F.2d 91, 94 (7th Cir. 1986). **AFFIRMED.**

APPENDIX B

ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey corporation, *Plaintiff,*

v.

ISRAEL IDENTITY TOURS, INC., a New Jersey corporation, et al., *Defendants.*

No. 92 C 2379

United States District Court
for the Northern District of Illinois, Eastern Division

1993 U.S. Dist. LEXIS 6141

May 6, 1993, Decided
May 10, 1993, Docketed

Plaintiff and counterdefendants' motion for summary judgment is denied. Marlene Ritter's motion for summary judgment is granted. Judgment is entered in favor of defendant Marlene Ritter and against plaintiff ITAS on the complaint. Larry Ritter and IIT, Inc.'s motion for summary judgment is granted in part. Judgment is entered in favor of defendants Larry Ritter and IIT, Inc. and against plaintiff ITAS on counts I, II, III, IV, VII, VIII and IX of the complaint. The motion is denied in all other respects.

Plaintiff Israel Travel Advisory Service, Inc. ("ITAS") sues defendants Israel Identity Tours, Inc. ("IIT, Inc."), a New Jersey Corporation, and Larry and Marlene Ritter (collectively "IIT") for conduct related to competition between ITAS and IIT in providing religious tours of Israel. Before the court are cross motions for summary judgment under Fed. R. Civ. P. 56.

Background

This action centers on IIT's alleged conduct in competing with ITAS to provide religious tours of Israel to Americans.[1] ITAS' complaint involves two principal types of alleged misconduct: IIT's misrepresentations in advertisements concerning its own tours and defamatory statements about the financial instability or demise of ITAS. Specifically, ITAS contends IIT's advertising falsely represented that Joel Liebowitz (a respected and wealthy member of the New Jersey Jewish community) was associated with IIT, that IIT had thirty years of experience in the religious tour business, that IIT and ITAS were the same company and that a bar/bat mitzvah celebrant was entitled to a completely free tour of Israel. ITAS asserts that IIT defamed ITAS by telling customers that ITAS was out of business and that ITAS had inferior food and accommodations. With this factual predicate, the complaint alleges an array of state and federal claims: Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, Illinois Consumer Fraud Act, 815 ILCS 505; the Illinois Uniform Deceptive Trade Practices Act, 815 ILCS 510; the New Jersey Consumer Fraud Act ("New Jersey Act"), N.J. Rev. Stat. §56:8-12; intentional interference with contract, tortious interference with business relations and defamation.

At the outset of the action, the complaint also named as defendants Israel Identity Tours, Inc., an Illinois corporation ("IIT, Inc. Illinois"), and Gilbert and Ilene Wallerstein (collectively "IIT Illinois"). Although IIT, Inc. and IIT, Inc. Illinois bear the same moniker, they are not legally related.

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[1] Defendants filed a counterclaim based on ITAS' competitive conduct. A default judgment was entered on the counterclaim on April 7, 1993 as a result of defendants' willful discovery violations. ITAS' motion for summary judgment on the counterclaim is therefore denied as moot.

They are separate corporations. IIT 12(m) P 8. Neither Larry Ritter nor IIT, Inc. has any ownership interest in IIT Illinois; Larry Ritter is not and never has been a shareholder, officer, director or employee of IIT Illinois. Id. PP 8, 9. However, IIT and IIT Illinois have cooperated to some extent in their ventures. ITAS 12(n) PP 20, 21. The IIT Illinois defendants were dismissed pursuant to stipulation in January 1993. ITAS 12(m) Ex. C.

Discussion

A movant is entitled to summary judgment under Rule 56 when the moving papers and affidavits show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once a moving party has met its burden, the nonmoving party must go beyond the pleadings and set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Becker v. Tenenbaum-Hill Assoc., Inc.*, 914 F.2d 107, 110 (7th Cir. 1990). Where the non-movant fails to make a sufficient showing on an essential element of his case, on which he would bear the burden of proof at trial, summary judgment is proper. *Celotex*, 477 U.S. at 322-23. Where the entire record could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

One common issue that runs through many of the arguments over the individual claims should be addressed first: Can IIT be held legally accountable for the acts of IIT Illinois? Although the issue is decisive on several claims, it is not taken up at length by the parties. No authority is cited and no affidavits are offered. ITAS conclusorily asserts that IIT is accountable for the acts of IIT Illinois. In ITAS' view, IIT has agency and "co-conspirator" liability for IIT Illinois' acts. As

evidence of the relationship, ITAS points to IIT advertisements that do not clearly distinguish between IIT and IIT Illinois, as well as a promotional letter sent by IIT Illinois identifying Larry Ritter as a representative in New Jersey. ITAS 12(n) PP 20, 21.

There is no legal or factual basis to hold IIT liable for IIT Illinois' acts. First, IIT is not a "co-conspirator" of IIT Illinois. This is a civil matter. ITAS musters no authority that conspiracy theory has any place in civil proceedings. And even if the theory were not completely out of place, there is absolutely no evidence in the record to create a genuine issue of material fact as to the central element of conspiracy — whether there was an agreement between IIT and IIT Illinois to engage in illegal activity. There is also no evidence to create a genuine issue of material fact as to any other kind of agency liability. It is undisputed that no defendant was an employee, partner or any other kind of contractual agent of IIT Illinois. There is nothing in the record to support the inference that IIT ever created any apparent authority by indicating that IIT Illinois was authorized to act on IIT's behalf.[2] True enough, there is evidence from which a jury could reasonably conclude that IIT and IIT Illinois did business together. But merely having a cooperative or even contractual relationship with another person does not make a defendant liable for the acts of that person. In short, evidence that could create a factual dispute and avoid summary judgment as to IIT Illinois will not suffice to avoid summary judgment as to IIT.

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[2] On the other hand, there is a genuine issue of material fact as to whether Liebowitz had apparent authority to act on behalf of IIT. ITAS 12(m) PP 5-8. See generally Restatement (Second) of Agency §27 (1957). IIT might be held accountable for Liebowitz' conduct.

I. RICO

IIT argues it is entitled to summary judgment on ITAS' RICO claims because IIT lacks RICO standing under *Holmes v. Securities Investor Protection Corp.*, 117 L. Ed. 2d 532, 112 S. Ct. 1311 (1992). Any person injured in his business or property by reason of a violation of Section 1962 of RICO may recover treble damages plus attorney's fees. 18 U.S.C. § 1964; *Holmes*, 112 S. Ct. at 1316. In *Holmes*, the Supreme Court held that a plaintiff must demonstrate both cause in fact and proximate cause to recover under RICO. *Id.* at 1318. The *Holmes* plaintiff, SIPC, was a government corporation required to advance funds to reimburse securities broker-dealers' customers whenever the broker-dealers became insolvent. SIPC contended that it was injured by reason of the defendant's RICO violation because defendant's violation caused two broker-dealers to become insolvent, thereby triggering SIPC's statutory duty to advance funds. The Court rejected SIPC's claim on the ground that its injury was indirect, refusing to "go beyond that first step" because extending liability would precipitate massive and complex damages litigation which would not only burden the courts, but also undermine the effectiveness of treble-damages suits. *Id.* at 1319, 1321. Thus, a plaintiff complaining of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts generally stands at too remote a distance to recover. *Id.* at 1318.

ITAS correctly points out that its RICO claims do not fail on standing grounds. Although the three justice concurrence thought the matter should have been disposed of on standing to sue for the predicate act (securities fraud), the opinion of the Court in *Holmes* expressly declined to consider the issue of standing. Id. at 1321-22. Nonetheless, *Holmes* is fatal to ITAS'

RICO claims because ITAS cannot establish proximate cause.[3] ITAS does not claim it was directly injured by IIT's conduct. Instead, ITAS claims the injury resulted from defrauded customers choosing IIT instead of ITAS — a purely economic injury resulting from IIT's alleged fraud on third parties. To permit recovery on this theory would "go beyond that first step." Because only the intervening customer's choices connect IIT's alleged violation to ITAS' injury (*cf. Holmes*, 112 S. Ct. at 1319), ITAS fails to create a genuine dispute of material fact as to whether its injury was proximately caused by IIT's alleged violation.

Independently, IIT is entitled to summary judgment because there is no evidence in the record to create a factual dispute as to any predicate offense. ITAS alleges the predicate offenses of mail and wire fraud. To establish either offense ITAS must show, among other things, a misrepresentation made to ITAS on which it reasonably relied. *In re EDC, Inc.*, 930 F.2d 1275, 1280-81 (7th Cir. 1991). In the first place, ITAS does not even claim it relied on an IIT misrepresentation. Instead, ITAS claims customers relied on IIT misrepresentations. That possibility is legally insufficient to establish mail or wire fraud as a predicate offense as to ITAS. *Id.* And, even if the customer's reliance could establish fraud, there is no evidence in the record to create a factual dispute about any customer's reliance on IIT's (as opposed to IIT Illinois') misrepresentations. Summary judgment is granted against ITAS on its RICO claims, counts I through IV of the complaint.

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[3] Seventh Circuit RICO causation cases predating *Holmes* cited by ITAS are not discussed because they are no longer controlling.

II. Illinois Consumer Fraud Act And the Illinois Uniform Deceptive Trade Practices Act

ITAS seeks summary judgment under the Illinois Consumer Fraud and Deceptive Business Practices Act and the Illinois Uniform Deceptive Trade Practices Act (collectively "the Illinois Acts") based on IIT's alleged misrepresentations in connection with tour advertisements. IIT seeks summary judgment on ITAS' claims under the Illinois Acts based on the lack of evidence of any violation occurring in Illinois.

The Illinois Acts make unlawful certain unfair methods of competition and deceptive business practices. Although there is nothing in the Illinois Acts specifically limiting their effect to actions committed in or directed at Illinois, the parties agree that the Acts must be so limited.[4] IIT points out that it has never sent promotional mailings, advertised or solicited customers in the State of Illinois. IIT 12(m) PP 10, 11. Even assuming that IIT's advertisements contained misrepresentations that would violate the Illinois Acts, argues

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[4] Although no authority was cited by the parties or uncovered by the court, this must be the case. Many states have common law or statutory prohibitions on unfair or deceptive commercial practices. Some are more specific than others, see 815 ILCS 505/2A-2B, or provide different levels of protection. A company doing business (and therefore subject to jurisdiction) in more than one state would be forced to comply in all states with the state's laws that prescribed the strictest level of protection if the company could be held accountable for acts committed outside that state. Moreover, states are free to specify conflicting obligations; that could completely prevent the company from insuring its actions were lawful. Finally, holding IIT liable for conduct that is permissible where it was performed could run afoul of the constitution's full faith and credit mandate and the concern for fair play and substantial justice underlying the minimum contacts requirement.

IIT, there is no evidence that prohibited conduct occurred in Illinois.

ITAS responds by underscoring evidence that could show IIT has numerous contacts with Illinois and that IIT Illinois violated the Illinois Acts. ITAS 12(n) P 10. Neither of these kinds of evidence could create a disputed issue of material fact as to IIT's liability under the Illinois Acts. As ITAS points out, the record is replete with evidence that Larry Ritter and IIT "conducted business" in Illinois in the jurisdictional sense of the term. ITAS 12(n) P 10. But evidence of commerce is just that: evidence of commerce. It is incumbent on ITAS to produce some evidence to create a material dispute as to wrongdoing under the Illinois Act. Evidence of wrongdoing in Illinois or with respect to an Illinois customer is wholly lacking. And, as already discussed, evidence of wrongdoing by IIT Illinois cannot help ITAS avoid summary judgment. Summary judgment is granted against ITAS on its claims under the Illinois Acts, counts VII and VIII of the complaint.

III. New Jersey Consumer Fraud Act

ITAS seeks summary judgment of liability on its New Jersey Consumer Fraud Act claim on the basis of IIT's alleged misrepresentations in connection with tour advertisements. IIT seeks summary judgment on the ground that the New Jersey Act confers a cause of action only on injured consumers.

The New Jersey Act confers a private cause of action only on (1) consumers who have been (2) misled and damaged as a proximate result of a violation of the act. *Knapp v. Potamkin Motors Corp.*, 253 N.J. Super. 502, 602 A.2d 302, 303 (N.J. Super. 1991) (consumer must demonstrate he was misled); *Del Tufo v. Nat'l Republican Senatorial Comm'ee*, 248 N.J. Super. 684, 591 A.2d 1040, 1042 (N.J. Super. 1991) (act did not govern political contributors). ITAS is not a consumer of IIT's services or goods and does not allege that it was misled and

damaged as a proximate result of a violation. There is therefore no genuine dispute of material fact and IIT is entitled to judgment as a matter of law.

ITAS urges that the New Jersey Act should be given a broader reach. In ITAS' view, the New Jersey Act should be given the more liberal effect accorded the similar Illinois Acts for the same public policy reasons relied on by the Illinois courts. ITAS also sees the New Jersey Act as extending beyond consumers because the act defines person to include corporations. Were the court writing on a blank slate, ITAS' arguments might have merit. However, as ITAS implicitly acknowledges, the law in New Jersey as annunciated by the New Jersey courts clearly precludes its claim. This federal court, exercising its supplemental jurisdiction to adjudicate a pure state law claim, is not free to second guess the New Jersey courts. Summary judgment is granted against ITAS on its claim under the New Jersey Act, count IX of the complaint.

IV. Intentional Interference and Tortious Interference

IIT seeks summary judgment on ITAS' state law claims for intentional interference with contract and tortious interference with business relations. While the parties dispute whether a customer with whom IIT allegedly interfered must be identified by name, they agree that there must be evidence of a wrongful luring away of customers. *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 190 Ill. App. 3d 524, 546 N.E.2d 33, 37, 137 Ill. Dec. 409 (Ill. App. 1989); *Leslie Blau Co. v. Alfieri*, 157 N.J. Super. 173, 384 A.2d 859, 865 (N.J. Super. 1978).[5] There is a genuine issue of material fact as to whether

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[5] The parties' argument over which state's law to apply is not discussed because both states require this showing. Nor is IIT's (continued...)

there was a luring away as well as whether the luring away was wrongful. ITAS 12(n) Ex. I (evidence of customer lured away on Liebowitz' representation regarding quality of ITAS hotels). The motion for summary judgment is denied as to counts XI and XII of the complaint.

V. Defamation

IIT seeks summary judgment on the ground that there is no evidence that IIT or any of its agents made defamatory statements about ITAS. There is a genuine issue of material fact on this issue. Compare IIT 12(m) P 14 with ITAS 12(n) Ex. I. The motion for summary judgment is denied as to count XIII of the complaint.

VI. Marlene Ritter

Marlene Ritter independently moves for summary judgment on the entire complaint on the ground that there is no evidence of her conduct or that she is connected in any way to IIT, Inc. Ms. Ritter admits that she answered the IIT, Inc. telephone on occasion because it was located in her house. However, in her affidavit, Ms. Ritter attested that she has no ownership interest in IIT, Inc., that she was never an officer or employee of IIT, Inc., and that she has never contacted any customers, prospective customers or business affiliates of ITAS. Marlene Ritter 12(m) PP 4, 6, 8-9.

There is no evidence of any conduct by Ms. Ritter that could be culpable or any legal relation to IIT, Inc. for which she could be held accountable for IIT, Inc.'s actions. ITAS attempts

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(...continued)
argument that the allegations of the complaint must specifically identify a customer: on a motion for summary judgment, the inquiry concerns the evidence in the record, not the allegations of a complaint.

to create a disputed issue of fact, but to no avail. See ITAS 12(n) to Marlene Ritter P 6. ITAS cites Exhibit P to its 12(n) statement for the proposition that Ms. Ritter was a "New Jersey Representative" of IIT. But Exhibit P refers only to Larry Ritter. ITAS cites the Geller deposition as evidence that Ms. Ritter was an IIT, Inc. representative; however, ITAS does not indicate where the Geller deposition excerpt might be found in the record. In fact, the Geller deposition excerpt was not attached to any statement submitted to the court. Finally, ITAS cites the Kanarek deposition for the proposition that Ms. Ritter told Muriel Kanarek that IIT and ITAS were the same entity. The Kanarek excerpt does not give any indication that Kanarek referred to Ms. Ritter, only identifying the person with whom she spoke as a woman. ITAS' other contested paragraphs fail to make any citation to the record. Marlene Ritter's motion for summary judgment on the complaint is granted.[6]

Conclusion

Plaintiff and counterdefendants' motion for summary judgment is denied. Marlene Ritter's motion for summary judgment is granted. Judgment is entered in favor of defendant Marlene Ritter and against plaintiff ITAS on the complaint. Larry Ritter and IIT, Inc.'s motion for summary judgment is granted in part. Judgment is entered in favor of defendants Larry Ritter and IIT, Inc. and against plaintiff ITAS on counts I, II, III, IV, VII, VIII and IX of the complaint. The motion is denied in all other respects.

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[6] ITAS contends that Ms. Ritter's separate motion violates the Local Rules' 15-page limit on motions. The contention lacks merit. The motion violates neither the spirit nor the letter of the Local Rules. As a different defendant, Ms. Ritter was entitled to file her own motion. Moreover, the five-page motion, based on completely different grounds than Larry Ritter and IIT, Inc.'s motion, did not abuse her entitlement.

APPENDIX C

ISRAEL TRAVEL ADVISORY SERVICE, INC., a New Jersey corporation, *Plaintiff,*

v.

ISRAEL IDENTITY TOURS, INC., an Illinois corporation, ISRAEL IDENTITY TOURS, INC., a New Jersey corporation, ILENE WALLERSTEIN, GILBERT WALLERSTEIN, LARRY RITTER, MARLENE RITTER and KAREN KAPLAN, *Defendants.*

No. 92 C 2379

United States District Court
for the Northern District of Illinois, Eastern Division

1993 U.S. Dist. LEXIS 8744

June 24, 1993, Decided
June 28, 1993, Docketed

Plaintiff Israel Travel Advisory Service, Inc. ("ITAS") sues defendants Israel Identity Tours, Inc. ("IIT, Inc."), a New Jersey Corporation, and Larry and Marlene Ritter (collectively "IIT") for conduct related to the competition between ITAS and IIT to provide religious tours of Israel. The court recently resolved the parties' cross motions for summary judgment. See Memorandum Opinion & Order, No. 92 C 2379 (N.D. Ill. May 6, 1993) ("the summary judgment opinion"). Both parties seek reconsideration.

Background

To recount, this action centers on IIT's alleged conduct in competing with ITAS to provide religious tours of Israel to Americans. ITAS' complaint involves two principal types of

alleged misconduct: IIT's misrepresentations in advertisements concerning its own tours and defamatory statements about the financial instability or demise of ITAS. At the outset of the action, the complaint also named as defendants Israel Identity Tours, Inc., an Illinois corporation ("IIT, Inc. Illinois"), and Gilbert and Ilene Wallerstein (collectively "IIT Illinois"). Although IIT, Inc. and IIT, Inc. Illinois bear the same moniker, they are not legally related. They are separate corporations. IIT 12(m) P 8. Neither Larry Ritter nor IIT, Inc. has any ownership interest in IIT Illinois; Larry Ritter is not and never has been a shareholder, officer, director or employee of IIT Illinois. Id. PP 8, 9. However, IIT and IIT Illinois have cooperated to some extent in their ventures. ITAS 12(n) PP 20, 21. The IIT Illinois defendants were dismissed pursuant to stipulation in January 1993. ITAS 12(m) Ex. C.

The summary judgment opinion granted Marlene Ritter complete relief, IIT, Inc. and Larry Ritter partial relief, and ITAS no relief. Specifically, judgment was entered on the complaint against Ms. Ritter because there was "no evidence of any conduct by Ms. Ritter that could be culpable or any legal relation to IIT, Inc. for which she could be held accountable for IIT, Inc.'s actions." Summary Judgment Opinion at 11-12. Judgment was entered in favor of Larry Ritter and IIT, Inc.: (1) on the Racketeer Influenced and Corrupt Organizations Act ("RICO") counts (I through IV) on the independent grounds that ITAS failed to create a triable issue as to proximate cause or a predicate offense; (2) on the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505) and the Illinois Uniform Deceptive Trade Practices Act (815 ILCS 510) counts (VII and VIII) on the ground that there was no evidence of wrongdoing committed in Illinois or with respect to an Illinois customer; and (3) on the New Jersey Consumer Fraud Act (N.J. Rev. Stat. § 56:8-12) count (IX) on the ground that ITAS was not a consumer and did not contend that it had been

misled. Larry Ritter and IIT, Inc.'s motion was denied as to ITAS' common law claims for intentional interference, tortious interference and defamation owing to a genuine dispute as to the facts. ITAS seeks reconsideration of the granting of partial summary judgment; Larry Ritter and IIT, Inc. seek reconsideration of the denial as to the common law claims.

Discussion

Motions for reconsideration serve a limited function. *Keene Corp. v. International Fidelity Ins. Co.*, 561 F. Supp. 656, 665 (N.D. Ill. 1982), aff'd, 736 F.2d 388 (7th Cir. 1984). *Accord Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985). A court will ordinarily grant a motion to reconsider to correct manifest errors of law or fact or to consider newly discovered evidence that could not have been adduced during the pendency of the previous motion. *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987); *Kohl v. Murphy*, 767 F. Supp. 895, 904 (N.D. Ill. 1991). Motions for reconsideration may not raise legal theories or arguments that could have been raised in the original motion. Id. at 904. *Accord Woods v. Michigan City*, 940 F.2d 275, 280 (7th Cir. 1991).

I. Marlene Ritter

ITAS contends the court erroneously relied on "clerical" mistakes in granting Marlene Ritter summary judgment. [1] In the summary judgment opinion, the court noted that two of the three exhibits relied on by ITAS to avoid summary judgment as

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[1] It is somewhat misleading to characterize the omission of the Geller deposition as a "clerical" error. The omission may have been unintentional. But failing to make critical evidence a part of the record is a far more serious mistake than, say, specifying one exhibit instead of another when both exhibits are part of the record.

to Ms. Ritter could not be found in the record. Specifically, ITAS referred to Exhibit P as an advertisement characterizing Marlene Ritter as a "New Jersey representative" of IIT, Inc., but Exhibit P referred only to Larry Ritter. Now ITAS claims it intended to draw attention to Exhibit N, not Exhibit P. ITAS also referred to the deposition testimony of Ben Ami Geller without indicating where it could be found; in fact, ITAS now admits that the Geller deposition could not be found in the record.

Even considering both these pieces of evidence, summary judgment for Marlene Ritter is required. This evidence would allow a jury to conclude that Ms. Ritter was a "representative" of IIT, Inc. That fact is not, of course, *mala in se* — Ms. Ritter is not liable simply by virtue of affiliation. Ms. Ritter could only be personally liable if there is a genuine dispute as to either (1) her own culpable conduct or (2) an agency relationship where legal responsibility would flow to her. This evidence creates a dispute as to neither. Obviously, Ms. Ritter's status as a representative is not actionable. And even if she were a representative of IIT, Inc., Ms. Ritter would be at the "wrong end" of the agency to have to answer for the actions of IIT, Inc. ITAS offers no authority that holds an agent liable for the actions of her principal.

ITAS also faults the summary judgment opinion for failing to draw the inference that Marlene Ritter was the subject of Muriel Kanarek's deposition testimony. Kanarek testified that she called IIT, Inc.'s number, that she spoke to an unidentified woman, and the woman told Kanarek that ITAS and IIT, Inc. were the same entity. From this, ITAS contends the court should have inferred that Marlene Ritter was the speaker on the phone. In her affidavit, Ms. Ritter flatly denies having any substantive conversation with a customer, and specifically denies telling anyone that IIT, Inc. and ITAS are "the same thing." ITAS correctly points out that it is undisputed that

Kanarek called IIT, Inc.'s number, that the office was located in the Ritter home, and that Ms. Ritter occasionally answered the phone. However, ITAS also maintains that it is undisputed that Marlene Ritter was the only woman who answered the phone at IIT because only Larry, Marlene and their son live in the Ritter home. That is not true. There was absolutely nothing in the summary judgment record to establish the identity of the persons living in the Ritter residence or answering the IIT phone. There was nothing even to create a factual dispute that only Marlene Ritter answered the phone. Even on reconsideration, there is still nothing in the record that could establish that Ms. Ritter was the only woman to answer the IIT, Inc. phone; IIT maintains that many different women could have answered the phone. See Marlene Ritter Resp. to Mot. to Reconsider at 5. The court is only required to draw reasonable inferences in favor of ITAS, not every inference. *Matsushita Elect. Indust. Co. v. Zenith Radio Corp*, 475 U.S. 574, 488 (1986). Where the only evidence against Marlene Ritter at all is that an unidentified woman spoke to a customer, it is not reasonable to infer that Marlene Ritter was that unidentified woman. (In any case, ITAS could not recover for Kanarek because she ultimately traveled with ITAS.) The motion to reconsider is denied.

II. Denial Of Summary Judgment For Larry Ritter and IIT, Inc.

Larry Ritter and IIT, Inc. seek reconsideration of the court's denial of summary judgment on ITAS' common law claims. First, IIT contends the court erred by underscoring the testimony of Martin Smithline to create a genuine dispute on ITAS' defamation claim. IIT argues that the Smithline testimony could only support a finding that Joel Liebowitz expressed a constitutionally protected opinion to Smithline. This argument falls short for three reasons. First, IIT failed to make the argument in support of its original motion. As it is a

new argument that could have been made on the original motion, it is not properly considered on its merits in a motion to reconsider. Second, although some of the statements attributed to Liebowitz might be opinion, the jury could conclude others are actionable facts. For example, the location of a hotel is a fact, as is the identity of the persons leading ITAS' tours and the mode of transportation used by ITAS to transport customers to the Masada. See Ritter and IIT, Inc.'s Mot. to Reconsider Ex. B at 6-7, 10, 12. Third, although the Kanarek deposition could not avoid summary judgment as to Marlene Ritter, it is sufficient to create a genuine dispute of material fact as to IIT, Inc. [2]

Next, Larry Ritter and IIT, Inc. contend they were entitled to summary judgment on ITAS' claims for intentional and tortious interference with contract. IIT points out that the evidence relied on by the court — Leibowitz' conversation with Smithline — could not create a dispute as to interference with contract because Smithline was not in fact lured away; Smithline ultimately traveled with ITAS. In this regard, IIT is correct that the summary judgment opinion implicitly incorporated a clear error of fact that warrants reconsideration.

ITAS has two responses. First, ITAS argues that the attempted luring away of Smithline nonetheless creates a genuine dispute of fact because a jury might infer that IIT was successful with other potential customers. But even accepting ITAS' contention that customers need not be identified by name at the pleading stage, there must be some evidence in the record from which the jury could conclude ITAS was damaged, i.e.,

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[2] ITAS correctly points out that the summary judgment opinion's failure to rely on other facts in ITAS' Local Rule 12(n) statement does not necessarily mean that they would not create a sufficient factual dispute. However, the court declines to rely on unattributed remarks (see ITAS 12(n) PP 14a, 14e).

that at least a single customer was actually lured away. A reasonable jury could not make that inference from Smithline's testimony alone.

ITAS next attempts to point out other evidence to create a genuine dispute of material fact:

> *In its initial response to IIT's motion, ITAS made references to numerous other forms of interference, including, but not limited to: (1) customers and prospective customers from the Miles Township Jewish Congregation; (2) ITAS' relationship with El Al; (3) threats to destroy ITAS if the bar/bat mitzvah offer was not dropped; and (4) customers from Chicago who signed up and made a deposit with ITAS and subsequently switched to IIT (e.g., Dr. Braunstein, Jay Piell, Ilene Greenfield, Sherry Mandell, and others) (ITAS' Resp. in Opp. to Defs. Mot. for Sum Judg. at 10). There is also the testimony from Sheldon Cavell who indicated that he, as an ITAS customer and while on the ITAS tour, was approached and asked if he would be a sales agent and representative for IIT.*

ITAS' Resp. to Defs. Mot. to Recons. at 3-4. Regrettably, ITAS' brief is quoted at length because it merely sends the reader after the proverbial wild goose. ITAS' original summary judgment brief did make similar references, but those references too were without support. Taking the evidence cited by ITAS in turn:

(1) while there is evidence that former defendants made a presentation to the Niles Township Jewish Congregation, there is no evidence from which a reasonable jury could conclude that the presentation resulted in a lost customer.

(2) The evidence regarding El Al also does not create a dispute as to whether ITAS was injured by defendants' conduct by a lost contract with El Al or any customer.

(3) Former defendants' purported threat to "destroy" ITAS could not support a finding that any contractual relationship was actually lured away.

(4) The deposition testimony of other named would-be ITAS customers who ultimately traveled with IIT does not appear in the record anywhere. Likewise, testimony by Sheldon Cavell is nowhere to be found in the record.

In short, a reasonable jury could not find that IIT tortiously or intentionally interfered with ITAS' contractual relationships because ITAS fails to come forward with any evidence to create a dispute as to injury — *i.e.*, evidence of a lost contractual relationship as a result of IIT's conduct.

Finally, Larry Ritter contends that at the least, summary judgment should have been granted in his favor personally.[3] Larry Ritter argues that although acts of an agent of IIT, Inc. could be imputed to IIT, Inc., the acts could not be imputed to him. The argument is thoroughly new; it need not be considered on its merits. However, it is also patently wrong: there is a genuine dispute as to whether Larry Ritter is responsible for his arguable apparent-authority partner, Liebowitz. See Summary Judgment Opinion at 4 n.2.

III. Grant Of Summary Judgment To Larry Ritter and IIT, Inc.

ITAS finds fault with each grant of summary judgment except for the claim under the New Jersey Consumer Fraud Act.

A. Liability for Acts of Former Defendants

First, ITAS takes the court to task for concluding that IIT

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[3] At this stage, Larry Ritter's personal argument is only relevant to the claim for defamation.

could not be held liable for acts committed exclusively by former defendants. In that regard, the court concluded that ITAS had failed to show that IIT could be liable on a conspiracy theory in a civil matter, and that, in any case, there was no evidence of an agreement to engage in unlawful activity. See Summary Judgment Opinion at 3-5. As ITAS points out, both conclusions were clear errors of law. [4]

"All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit, are equally liable." *W. Page Keeton, Prosser & Keeton on Torts* 322-24 (5th ed. 1984) (footnotes omitted). "It is in connection with such vicarious liability that the word conspiracy is often used." *Id.* A civil conspiracy is a combination of two or more persons acting in concert to commit an unlawful act or to commit a lawful act by unlawful means. *Lenard v. Argento*, 699 F.2d 874, 881 (7th Cir. 1983); *Wolf v. Liberis*, 505 N.E.2d 1202, 1208, 106 Ill. Dec. 411 (Ill. App. 1987). The agreement need not be explicit, it may be implied. *W. Page Keeton, supra.* And the existence of the

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[4] These conclusions are reconsidered only because they amount to clear errors of law. ITAS also contends it should have a fresh opportunity to address the issues because the court raised them sua sponte, but that is just not true. IIT moved for summary judgment asserting that no act of IIT, Inc. or Larry Ritter was culpable. When ITAS opposed the motion by attempting to create a factual dispute as to conduct of former defendants, ITAS' burden included positively demonstrating that facts regarding former defendants are material. As the summary judgment opinion noted, ITAS did not carry this burden initially, instead asserting conclusorily that conspiracy could provide the basis for liability. See ITAS Resp. to IIT, Inc. Mot. for Summary Judgment at 5, 10, 11-12. ITAS cited no authority whatsoever on a keystone contention in its brief.

agreement is seldom established by direct evidence; it may be established by inference from circumstantial evidence. *Kronfeld v. First Jersey Nat'l Bank*, 638 F. Supp. 1454, 1469 (D.N.J. 1986). Except in the clearest of cases, that inference is left to the jury. *Hampton v. Hanrahan*, 600 F.2d 600, 621 (7th Cir. 1979) (the question whether an agreement exists should not be taken from the jury in a civil conspiracy case so long as there is a possibility that the jury can infer from the circumstances that the alleged conspirators had a meeting of the minds and thus reached an understanding to achieve the conspiracy's objectives), rev'd on other grounds, 446 U.S. 754, 64 L. Ed. 2d 670, 100 S. Ct. 1987 (1980), *citing Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970).

There is sufficient evidence in the record for a reasonable jury to conclude an agreement existed between IIT and IIT Illinois to compete with ITAS unlawfully. IIT and IIT Illinois cooperated extensively in business. IIT 12(n) P 21. Larry Ritter admitted he knew that former defendant Ilene Wallerstein viewed the competition between the IIT companies and ITAS as a "war," that Wallerstein viewed the competition as personal and a matter of character. Id. P 24-25. Larry Ritter said to Fred Speigel and others that he was only in the Israel travel business to teach ITAS a lesson. Id. P 26. From this evidence, it would not be "impossible" for a reasonable jury to infer the existence of a conspiratorial agreement. (Conspiracy liability is not a specific count but will be discussed below where applicable.)

B. RICO

ITAS next contends the court erred in granting summary judgment on its RICO claims. The summary judgment opinion granted summary judgment on the independent grounds that (1) ITAS failed to create a triable issue as to proximate cause and (2) ITAS failed to point to a disputed issue of fact regarding the

predicate offenses of mail and wire fraud. As to the proximate cause requirement, ITAS contends the summary judgment opinion gave the recent case of *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311 (1992) too broad a reading. In *Holmes*, the Court imposed a proximate cause requirement on RICO recovery. The summary judgment opinion concluded that:

> *Holmes is fatal to ITAS' RICO claims because ITAS cannot establish proximate cause. ITAS does not claim it was directly injured by IIT's conduct. Instead, ITAS claims the injury resulted from defrauded customers choosing IIT instead of ITAS — a purely economic injury resulting from IIT's alleged fraud on third parties. To permit recovery on this theory would "go beyond that first step." Because only the intervening customer's choices connect IIT's alleged violation to ITAS' injury (cf. Holmes, 112 S. Ct. at 1319), ITAS fails to create a genuine dispute of material fact as to whether its injury was proximately caused by IIT's alleged violation.*

Summary Judgment Opinion at 6.

ITAS views the proximate cause requirement as turning mainly on foreseeability and contends the court gave the requirement short shrift. ITAS also contends the summary judgment opinion erred by not giving more weight to the Seventh Circuit's pronouncement in *Haroco, Inc. v. American Nat'l B. & T. Co.*, 747 F.2d 384, 398 (7th Cir. 1984), aff'd, 473 U.S. 606, 87 L. Ed. 2d 437, 105 S. Ct. 3291 (1985), that RICO's causation requirement is met merely by showing that the acts "directly or indirectly . . . injured the plaintiff's business or property."

After considering ITAS' arguments, the court is not

convinced that the summary judgment opinion contains any error of law regarding proximate cause. The plaintiff in *Holmes* complained of injury that allegedly occurred because defendant's conduct rendered insolvent several broker-dealers whom the plaintiff was required by law to indemnify against the customer's claims. ITAS' claim here is no less remote. The *Holmes* plaintiff's injury was in some sense a "foreseeable" result of the commission of a RICO violation aimed at bankrupting the broker-dealers — the *Holmes* plaintiff had a duty as a matter of law to pay claims on behalf of bankrupt broker-dealers. Here, the fact that some competitor might lose profit as a result of misrepresentations is no more foreseeable. For example, there is no indication that customers chose exclusively between ITAS and IIT or that absent the alleged misrepresentations, customers would have taken any tour at all. Moreover, *Holmes* itself incorporates the panoply of "judicial tools" that make up proximate cause, not just the foreseeability analysis. 112 S. Ct. at 1318. The difficulty in assessing ITAS' damages on a RICO theory with any degree of certainty; the problems associated with apportioning recovery among the directly injured customers and indirectly injured competitors; and the ability of allegedly defrauded customers to seek independent redress — all these considerations weigh against finding IIT's alleged RICO violation was the proximate cause of ITAS' lost profits. *Cf. id.* Nor does *Haroco* require a different result: the issue in *Haroco* was not the requirements for proximate cause but whether a RICO violation required a showing of "racketeering injury." 747 F.2d at 387.

Independently, the court adheres to the mail and wire fraud reliance requirement articulated in the summary judgment opinion. ITAS seems to contend that the case relied on — *In re EDC, Inc.*, 930 F.2d 1275, 1280-81 (7th Cir. 1991) — is an anomaly, a mistake. Even were the court convinced of this view, as the most recent case directly on point, *EDC* remains

the law of this circuit. District courts are not authorized to reconsider "mistaken" opinions by the courts of appeals. See *Gacy v. Welborn*, No. 92 C 3448, 1993 WL 107075, at *6 (7th Cir. Apr. 12, 1993).

C. The Illinois Acts

Next, ITAS contends the summary judgment opinion blundered by limiting the coverage of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505) and the Illinois Uniform Deceptive Trade Practices Act (815 ILCS 510) (collectively "the Illinois Acts") to "actions committed in or directed at Illinois." Summary Judgment Opinion at 8. In its original motion for summary judgment, IIT argued that it was entitled to summary judgment on the Illinois Acts claims because, among other grounds, the Illinois Acts "can only apply to actions taken in the State of Illinois with respect to Illinois consumers." See Ritter & IIT, Inc.'s Mem. in Supp. of Summary Judgment at 9. In responding, ITAS did not seem to dispute IIT's view of the law; indeed, ITAS offered no authority whatsoever on the question. See ITAS' Opp. to Ritter & IIT, Inc. Mot. for Summary Judgment at 2-7. Instead, ITAS offered considerable evidence that IIT had done business in Illinois, and ITAS conclusorily asserted that IIT was accountable for the conduct of IIT Illinois. The court concluded that summary judgment was proper because although there was evidence that IIT had done business in Illinois in the jurisdictional sense, "evidence of wrongdoing in Illinois or with respect to an Illinois customer is wholly lacking." Summary Judgment Opinion at 9. Now, for the first time, ITAS contends the court erred by imposing the Illinois conduct or customer

limitation. [5]

ITAS contends that *Uniroyal Goodrich Tire Company v. Mutual Trading Corp.*, 749 F. Supp. 869 (N.D. Ill. 1990) explicitly rejects the Illinois customer or conduct limitation imposed on the Illinois Acts by this court. In Uniroyal Goodrich, the defendant (an Illinois corporation) argued that the complaint failed to state a claim under the Illinois Consumer Fraud Act because it failed to allege any "Illinois conduct, consumption, or injury." 749 F. Supp. at 877. The court noted that:

> *The statute prohibits "deceptive acts or practices" in the "conduct of any trade or commerce." The phrase "trade and commerce" means "the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this State."*

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[5] Once again, ITAS' asserts that the court raised the issue sua sponte, pointing out that the summary judgment opinion noted that "no authority was cited by the parties." The lack of authority does not, however, mean the issue was not briefed by the parties. It simply means the parties failed to offer relevant authority on a timely basis. As noted in the text, IIT put the scope of the Illinois Acts directly in issue and ITAS seemed to concede IIT's view. It was incumbent on the court to determine the scope of the Illinois Acts to resolve the arguments explicitly made by the parties. Thus, ITAS could ordinarily not raise the issue on reconsideration because nothing prevented ITAS from making the argument in opposing the original motion. However, ITAS' arguments are considered to the extent necessitated by the summary judgment opinion's incorporation of a clear error of law.

We deny defendants' motion to dismiss. . . .

Id. at 878 (citations omitted; emphasis in original). The court did not offer any further rationale.

Although *Uniroyal Goodrich* may require a different statement of the law, it does not require any change in result of the summary judgment opinion. As an initial matter, it should be pointed out that contrary to ITAS' view, *Uniroyal Goodrich*—the decision of another district court—does not bind this court. Even if it did, however, *Uniroyal Goodrich* is not very helpful here. The only indication of the rationale of Uniroyal Goodrich is the court's emphasis of the word "indirect" in the statute. But as IIT stresses, at least one *Uniroyal Goodrich* defendant was an Illinois corporation. See id. at 871. That alone could easily satisfy the Illinois Acts' indirect effect requirement and mitigates this court's concerns about over-extending the reach of the Illinois Acts. *Cf.* Summary Judgment Opinion at 8 n.4. Of course, all of the parties in this action are foreign citizens. Therefore, *Uniroyal Goodrich* does not appear to dictate the result here, one way or the other.

On the other hand, *Uniroyal Goodrich* makes clear that the summary judgment opinion did not contemplate all of the available indices of the reach of the Illinois Acts. Specifically, the summary judgment opinion did not take account of the guidance provided by the Illinois Consumer Fraud Act itself: by its terms, the act only prohibits "deceptive acts or practices" in the "conduct of any trade or commerce . . . directly or indirectly affecting the people of this state." *Uniroyal Goodrich*, 749 F. Supp. at 878, quoting 815 ILCS 505/1, 505/2. In some circumstances, the direct-or-indirect-effect test would arguably have a broader ambit than this court's requirement of conduct committed in Illinois or directed at Illinois residents.

Nonetheless, the *Uniroyal Goodrich* direct-or-indirect-effect test might implicate a spectrum of different requirements. (Witness the Supreme Court's evolving view of the simple language of the commerce clause or the Fourteenth Amendment.) The phrase must be given some content. While mindful of the Illinois Acts' directive that it be liberally construed to effect its purposes (see 505 ILCS 505/11a), the court also remains concerned with the problems of inconsistent obligations, federalism and substantial justice articulated in the summary judgment opinion. *See* Summary Judgment Opinion at 8 n.4. With these competing interests in mind, the question is whether there is some evidence in the summary judgment record to create a dispute as to whether IIT engaged in unfair methods of competition or unfair or deceptive acts or practices in the conduct of any trade or commerce that directly or indirectly affected the people of Illinois.

Even applying this standard, the conclusion remains the same: there is insufficient evidence in the summary judgment record to send these claims to the jury. Neither plaintiff nor any defendant is a citizen of this state. And the evidence of IIT's conduct (as opposed to IIT Illinois' conduct) relied on by ITAS fails to create a dispute as to any wrongdoing that affected an Illinois citizen. ITAS asserts that Larry Ritter solicited, booked and sold tours to Illinois residents. But ITAS relies solely on the deposition of former defendant Wallerstein, and Wallerstein's testimony was very narrow: although Larry Ritter did not advertise in Illinois, one lone couple from Illinois purchased their Israel tour through Larry Ritter. ITAS 12(n) Ex. F at 220. This sparse testimony cannot, however, create a dispute of fact as to wrongdoing that affected an Illinois citizen. There is nothing in the record indicating the manner of the sale or from which a reasonable jury could conclude that any deception, fraud or unfairness was involved in the sale.

ITAS also asserts that Ritter "mailed out hundreds of false advertisements across the nation, and presumably Illinois." ITAS Mot. to Reconsider at 14. ITAS is not entitled to this admitted "presumption," only reasonable inferences. And the record does not allow a reasonable inference. In support of its assertion, ITAS cites Larry Ritter's deposition testimony, which proceeded as follows:

> *Q. Who did you send those [advertisements] to?*
> *A. Anybody that called me . . . I would write [their name and address] on an envelope and then mail it out.*
> *Q. Put it in the United States Mail?*
> *A. Yes.*
> *Q. Did you send those throughout the country?*
> *A. Yes.*
> *Q. How many separate occasions would you say you did that, hundreds of times?*
> *A. At least.*

ITAS 12(n) Ex. D at 234. In support of his motion for summary judgment, however, Larry Ritter offered his affidavit stating that "Neither I, nor Israel Identity Tours, Inc., New Jersey, has ever done any promotional mailings in the State of Illinois . . . [or] ever solicited any customers, or advertised in, the State of Illinois." Ritter & IIT, Inc. Mem. in Supp. of Summary Judgment Ex. A. Given his affidavit, Larry Ritter's deposition testimony is insufficient to raise a factual dispute. The two are consistent, and although the deposition testimony would also be consistent with Larry Ritter sending a mailing to Illinois, his affidavit unequivocally rules out an Illinois mailing. There is no more direct evidence — such as testimony from an Illinois citizen who received a mailing or any contradictory testimony or documents — to create a factual dispute. On the record as a whole, a reasonable jury could not find that IIT mailed any advertisements to an Illinois citizen. Cf. *Matsushita, supra.*

Last, ITAS argues that IIT Illinois' conduct could create a material dispute of fact as to IIT's liability under the Illinois Acts.[6] But neither ITAS motion for reconsideration nor its original opposition to summary judgment nor, for that matter, ITAS' own motion for summary judgment, offer any evidence against IIT Illinois to create a factual dispute as to wrongdoing by IIT Illinois within the scope of the Illinois Acts. To be sure, ITAS recites numerous examples of IIT and IIT Illinois' joint conduct. See 12(n) P 10. And ITAS provided evidence to create a factual dispute as to whether former defendant Wallerstein might have defamed IIT, see id. PP 14, 21, and as to whether Wallerstein harbored an animus for ITAS. See id. PP 24-25. Nonetheless, ITAS does not argue that any of this evidence would go towards proving an unfair or deceptive practice, and the court cannot conclude that this evidence could create a genuine factual dispute about an unfair or deceptive practice. In sum, even applying the legal standard advocated by ITAS and considering evidence of IIT Illinois' conduct, there is no genuine dispute as to any violation of the Illinois Acts.

Conclusion

ITAS' notion to alter, amend and vacate the order granting summary judgment in favor of Marlene Ritter is denied. IIT's motion to reconsider the denial of summary Judgment as to counts XI, XII and XIII of the complaint is granted in part. Judgment is entered in favor of defendants Larry Ritter and IIT, Inc. and against plaintiff ITAS on counts XI and XII of the complaint. The motion is denied in all other respects.

ITAS' notion to alter or amend the order granting partial

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[6] As peviously discussed in this opinion, the existence of a conspiratorial agreement is a disputed issue of fact. Thus, given some evidence of wrongdoing by IIT Illinois, IIT would not be entitled to summary judgment.

summary judgment in favor of defendants Larry Ritter and IIT, Inc. is granted in part. The court's May 6, 1993 order granting partial summary judgment is amended as specified in the attached memorandum opinion and order; the motion to alter or amend is denied in all other respects.

APPENDIX D

ISRAEL TRAVEL ADVISORY SERVICE, INC., CELIA SHAR, AND MARILYN ZIEMKE, *Plaintiffs-Appellants, Cross-Appellees,*

v.

ISRAEL IDENTITY TOURS, INC., LARRY RITTER, AND MARLENE RITTER, *Defendants-Appellees, Cross-Appellants.*

Nos. 94-1451, 94-1554, 94-1815 & 94-1816

United States Court of Appeals
For the Seventh Circuit

Decided August 14, 1995

Plaintiff-appellant, cross-appellee Israel Travel Advisory Service, Inc. and defendant-appellee, cross-appellant Israel Identity Tours, Inc. filed petitions for rehearing and suggestions of rehearing *en banc* on August 3, 1995. No judge in regular active service has requested a vote on the suggestions of rehearing *en banc*, and all of the judges on the panel have voted to deny rehearing. The petitions for rehearing are therefore **DENIED.**

APPENDIX E

Applicable Portions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, *et seq.*

§1961. Definitions

As used in this chapter [18 USCS §§1961 et seq.] --

(1) "racketeering activity" means. . .

(B) any act which is indictable under any of the following provisions of title 18, United States Code: ...section 1341 (relating to mail fraud), section 1343 (relating to wire fraud). . .

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or

the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§1964. Civil remedies

(a) The district courts of the United States shall have

jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(2)

No. 95-1310

Supreme Court, U.S.
FILED
APR 22 1996

In The

Supreme Court of the United States

October Term, 1995

ISRAEL TRAVEL ADVISORY SERVICE, INC.,

Petitioner,

vs.

ISRAEL IDENTITY TOURS, INC., LARRY RITTER and MARLENE RITTER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a competitor asserting a claim pursuant to the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), based upon a predicate act of mail fraud committed by means of allegedly false advertising directed at potential customers, has standing under the RICO statute.

STATEMENT UNDER RULE 29.6

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Israel Identity Tours, Inc. states that it has no parent or subsidiary companies.

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Respondents, Israel Identity Tours, Inc., a New Jersey corporation ("IIT-NJ"), Larry Ritter and Marlene Ritter, respectfully submit this brief in opposition to the petition for writ of certiorari filed by Israel Travel Advisory Service, Inc. ("ITAS") which seeks the review of a decision of the United States Court of Appeals for the Seventh Circuit. That decision is reported at 61 F.3d 1250 (7th Cir. 1995) and is attached to ITAS' petition as Appendix A.

STATEMENT OF THE CASE

This case involves the unfounded claims of ITAS that Larry Ritter, Marlene Ritter and IIT-NJ engaged in unfair trade practices. Specifically, ITAS claims that IIT-NJ employed false advertisements which fraudulently induced prospective customers to travel with IIT-NJ instead of ITAS. Those claims of false advertising have been rejected throughout this case. The jury decided that there was no false advertising in its verdict under the Lanham Act claim which was affirmed by the Seventh Circuit. Nevertheless, ITAS continues to pursue its alleged RICO claims even though it has never been able to establish any fraud by the respondents or any damages as a result of the alleged fraud.

A. Procedural History.

On April 7, 1992, ITAS filed a thirteen count Verified Complaint for Injunctive and Other Relief against respondents, Ilene Wallerstein, Israel Identity Tours, an Illinois corporation, Gilbert Wallerstein and Karen Kaplan.[1] With respect to respondent Marlene Ritter, summary judgment was entered in her favor and against ITAS on each and every count of the

---

1. Ilene Wallerstein, Gilbert Wallerstein, Israel Identity Tours, an Illinois corporation and Karen Kaplan were dismissed pursuant to a settlement agreement on January 4, 1993. (DE 79).

Verified Complaint on May 6, 1993 on the basis that ITAS could present no evidence that she played any role in the operation of IIT-NJ. (DE 176). (A copy of the district court opinion entering summary judgment is attached to ITAS' petition as Appendix B, pp. 29-30.) Summary judgment was also entered in favor of Larry Ritter and IIT-NJ on ITAS' claims pursuant to the Racketeering Influenced and Corrupt Organizations Act, the New Jersey Consumer Fraud Act and the common law claims of intentional interference with contract and tortious interference with business relations. (DE 176; ITAS App. B). Judgment as a matter of law was entered in favor of Larry Ritter and IIT-NJ after the close of plaintiff's case on the claims for violation of Section 1 of the Sherman Antitrust Act and the Illinois Unfair Trade Practices Act. (DE 203 & 204, 223 & 224).

The only claims submitted to the jury were pursuant to the Lanham Act and common law defamation. On December 3, 1993, the jury rendered its verdict in favor of both Larry Ritter and IIT-NJ on the Lanham Act claim and in favor of Larry Ritter on the defamation claim. The only claim upon which ITAS was successful was its defamation claim against IIT-NJ. The jury rendered a verdict against IIT-NJ on the defamation claim and awarded ITAS $177,945.00 in compensatory and punitive damages. (DE 298). Judgment was entered on the district court docket on December 7, 1993. (DE 300).

In its petition, ITAS only seeks review concerning its RICO claims. The district court granted summary judgment to respondents based on this Court's decision in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). The district court stated that "*Holmes* is fatal to ITAS' RICO claims because ITAS cannot establish proximate cause. ITAS does not claim it was directly injured by IIT's conduct. Instead, ITAS claims the injury resulted from defrauded customers choosing IIT instead of ITAS — a purely economic injury resulting from

IIT's alleged fraud on third parties. To permit recovery on this theory would 'go beyond that first step.' Because only the intervening customers' choices connect IIT's alleged violation to ITAS' injury (*cf. Holmes*, 112 S. Ct. at 1319), ITAS fails to create a genuine issue of material fact as to whether its injury was proximately caused by IIT's alleged violation." (ITAS App. 25).

The Seventh Circuit affirmed the summary judgment entered by the district court. The basis of the Seventh Circuit's opinion, however, was not that ITAS lacked proximate cause, but that ITAS lacked standing to proceed against respondents. The Seventh Circuit reasoned that, with a predicate act of mail fraud, ITAS was not the object of the alleged fraud. Specifically, the appellate court indicated that the "essential point is that the victims of the fraud are the object of solicitude; § 1341 does not establish a regimen of truth-telling without regard to details like who is losing out and why." *Israel Travel*, 61 F.3d at 1258. (ITAS App. 13). The Seventh Circuit pointed out that, under tort law, "a plaintiff claiming injury by the defendant's violation of a statute must show not only that the defendant violated the law but also that the plaintiff is among the persons protected by the law." *Id.* at 125. (ITAS App. 14). Applying this rule of law, the Seventh Circuit correctly concluded that ITAS did not have standing to pursue a RICO claim against respondents because "Section 1341 does not protect vendors to persons who may be deceived, and firms suffering derivative injury from business torts therefore must continue to rely on the common law and the Lanham Act rather than resorting to RICO." *Id.*

Whether the basis is that ITAS lacks standing to proceed against respondents or that proximate cause does not exist, both the district court and the appellate court reached the correct result. The fraud alleged by ITAS was not directed to it. ITAS does not contend that it was defrauded by respondents' allegedly false advertising. If anybody was defrauded, it was the potential

customers. Only those customers would be allowed to proceed against respondents based on ITAS' claims. ITAS is left to the protection of other federal, state and common law claims.

B. Factual Background.

1. The Parties.

Larry Ritter, along with Jay Cantor and Sanford Goldberg, started a new company, IIT-NJ, in November, 1990, which competed with ITAS in the business of sending people on tours to Israel. (Tr. 318) Larry Ritter first considered going into the business of planning and organizing religious-oriented tours to Israel when he was approached by Israeli tour guide Ben Ami Geller in approximately October 1990. (Tr. 93). Geller had recently been terminated by ITAS, was seeking alternative means of generating income and had known Larry socially for several years. (Tr. 93-94, 1306-1307). Geller requested that Larry organize tours to Israel out of the New York/New Jersey area with Geller as the tour director and primary guide. (Tr. 1306-1307). Geller also had approached Ilene Wallerstein and Karen Kaplan with the idea that they organize tours to Israel from the Chicago and Boston areas, respectively. (Tr. 387, 390, 1131-1137).

Larry Ritter did not agree to Geller's proposal. At a meeting held on November 7, 1990, with Ilene Wallerstein, Ben Ami Geller and Karen Kaplan, Larry instead agreed to establish an independent New Jersey corporation named Israel Identity Tours, Inc. (Tr. 113-115, 396-397, 1300, 1306-1307). That company, IIT-NJ, was a legally and economically separate entity from the companies being established by Wallerstein and Kaplan. (Tr. 315-318, 397).

IIT-NJ began actual operations in 1991. (Tr. 126, 333, 337).

At that time, it attempted to sell tours to persons in the New York/ New Jersey area. (Tr. 126-127). ITAS and its owners, Marilyn Ziemke and Celia Shar, admit that they immediately fought against any attempt by IIT-NJ and Larry Ritter to succeed. (Tr. 968, 1188; Def. Exh. 29, 31). They denigrated IIT-NJ and Larry Ritter to prospective customers. (Tr. 980, 1188; Def. Exh. 29, 31). They told people that Larry Ritter was a liar who was part of the Mafia and who used gangster tactics. (Tr. 980-990, 1188; Def. Exh. 29, 31). This lawsuit has been part of the continuing attempts by ITAS to prevent Larry Ritter from succeeding in the business of sending tourists to Israel.

It must also be noted that ITAS is far more successful than IIT-NJ. ITAS sent over 2,000 people to Israel in both 1992 and 1993 while IIT-NJ sent a fraction of that amount. (Tr. 211, 803). Similarly, ITAS' gross revenues exceeded $5,500,000 in 1992 and was projected to exceed that amount in 1993. (Tr. 1024; Pl. Exh. 247, Def. Exh. 85). IIT-NJ's gross revenues in 1991 were only $385,285. (Pl. Exh. 389). Clearly, this case involves an existing comany with substantial business attempting to prevent a new business from successfully competing in the market.

2. *The Allegedly Fraudulent Conduct.*

ITAS claims that IIT-NJ engaged in mail fraud by means of alleged false advertising. In its petition, ITAS claims three instances of false advertising by IIT-NJ. The first involves IIT-NJ's advertisement of a free tour of Israel for a bar/bat mitzvah child. (Pl. Exh. 249 and 120). ITAS's claim that this advertisement was fraudulent is erroneous. Each and every such advertisement either had an asterisk indicating that restrictions applied or told the potential customer to contact IIT-NJ for further information. (Tr. 200-202, 349-350; Pl. Exh. 172, 222, 249 and 120). Furthermore, IIT-NJ did provide a free tour of Israel for the Bar/Bat Mitzvah child. (Tr. 198, 348-350). All the

customer paid for was the airfare, a fact which was explained to the potential customer by IIT-NJ. (Tr. 202-203, 349-350).

The second item discussed by ITAS is the inclusion of Joel Leibowitz's name in certain IIT-NJ advertisements. Contrary to ITAS' statements, none of the advertisements indicated that Leibowitz was a "partner" in IIT-NJ. Furthermore, although he never became a shareholder in IIT-NJ, Leibowitz did act as its agent and was involved in some of its business. (Tr. 206-206, 355). The advertisements which ITAS complains of never specified Leibowitz's position with IIT-NJ. (Tr. 355-356). The mere listing of Leibowitz's name, or the use of his name with his permission, cannot be said to be false advertising.

Similarly, the inclusion of a letter written by Rabbi Fellner was neither deceptive nor fraudulent. Rabbi Fellner's letter does not say that he had been on a tour with IIT-NJ, but that he had been on the tour. The fact is that he had been on the same tour to Israel even though it was not through IIT-NJ.

What ITAS does not tell this Court is that its claim that IIT-NJ committed fraud has been rejected by the jury. The exact facts argued by ITAS to constitute fraud were the subject of its claim under the Lanham Act. The jury had the opportunity to review all the evidence, including the advertisements which ITAS claims constitute false advertising. The verdict of the jury clearly reveals that it did not believe that IIT-NJ had engaged in false advertising or fraudulent conduct.[2]

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2. In its petition, ITAS implies that Larry Ritter would have Ilene Wallerstein call potential customers with the knowledge that those customers would defame ITAS. This allegation is both irrelevant to the issue presented to this Court and untrue. The jury entered a verdict in favor of Larry Ritter on the defamation count. Clearly, the jury believed Larry Ritter was not personally involved in any defamation of ITAS.

SUMMARY OF REASONS FOR DENYING WRIT

There are no compelling reasons for granting a writ of certiorari in this case. First, contrary to the contentions of ITAS, the Seventh Circuit's decision below does not create a conflict in the courts of appeals. The issue found by the Seventh Circuit to be dispositive in this case — whether a RICO plaintiff basing its claim on the predicate act of mail fraud must meet the standing requirements of the mail fraud statute — has been addressed twice in the courts of appeals, by the Ninth Circuit in *Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991) and the Seventh Circuit here. There is no conflict in these two decisions. The Seventh Circuit expressly followed *Lancaster* to avoid any conflict. *Israel Travel*, 61 F.3d at 1258. (ITAS App. 9). The Fourth Circuit did not address this issue, or any standing issue at all, in *Mid Atlantic Telecom v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir. 1994). Because there is no conflict in the courts of appeals on the "same" issue, ITAS' Petition falls well outside the criteria described in Rule 10 for this Court's exercise of its jurisdiction. Supreme Court Rule 10(a).

Second, the issue raised by the facts in this case is not of sufficient importance to justify this Court's attention. Any disposition of the narrow issue presented by the facts of this case will affect very few litigants: only plaintiffs such as ITAS who seek to impose RICO liability on a competitor where the predicate act of mail fraud is based on misleading statements made to mutual customers. As a practical matter, a decision of this Court on the issue raised by the Seventh Circuit's decision below would be of small effect.

Furthermore, an impressive arsenal of alternative remedies is already available to such a plaintiff. Here, ITAS unsuccessfully brought claims against the respondents under the

Lanham Act ,15 U.S.C. § 1501 *et seq.* and state consumer fraud statutes, which all make provision for exemplary damages and attorneys fees to the successful plaintiff. In a case such as this one, where the claim involves allegations of unfair competition, the RICO Act is not the appropriate means for seeking redress.

In addition, a decision on the mail fraud standing question would not necessarily apply to other RICO predicate acts. Justice Scalia concluded in his *Holmes* concurrence that separate analysis would be required for each predicate act. *Holmes*, 503 U.S. at 288. Justice O'Connor also conceded the possibility in her *Holmes* concurrence that analysis of § 1961 suggests that all predicate acts are not equal. *Id.* at 282. She concluded that the language of § 1961 relating to securities fraud reflected an intention that predicate act standing not bar a RICO plaintiff bringing claims based on securities fraud. *Id.* at 282-284. The language of § 1961 relating to mail fraud is different, suggesting that Justice O'Connor's analysis would yield a different result. Thus, the mail fraud standing issue raised here does not necessarily parallel the securities fraud standing issue for which certiorari was granted in *Holmes*.

Third, ITAS' Complaint that it is being unfairly subjected to an unprecedented standing requirement must be taken with a grain of salt. This Court has repeatedly held that federal litigants are always subject to several prudential standing requirements, including one based on inclusion in the "zone of interest" over which a statute imposes its protections. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-475, 102 S. Ct. 752, 759-760 (1982). Accordingly, the Seventh Circuit's decision here is consistent with this Court's prior decisions.

Fourth, because the jury below rejected ITAS' Lanham Act claim, ITAS' RICO claim (based on the same conduct) is

essentially mooted. There was no fraud here, and no customers were misled by the respondents.

Finally, the majority of Justices on this Court previously passed over the securities fraud standing issue in *Holmes*, electing to decide on the grounds of lack of proximate cause. *Holmes*, 503 U.S. at 275-276. Respondents submit that the Seventh Circuit misapplied the proximate cause standard enunciated by this Court in *Holmes*. As in *Holmes*, ITAS is a plaintiff which could not have been directly injured by the conduct of respondents. Lacking direct injury, the *Holmes* decision requires a finding that ITAS cannot establish proximate cause. Consequently, the standing issue need not be addressed by this Court.

REASONS FOR DENYING THE WRIT

Standard for the Granting of a Writ of Certiorari

"A petition for a writ of certiorari will be granted only for compelling reasons." Supreme Court Rule 10. Where a conflict in the courts of appeals is raised, this Court may exercise its discretion if the subject of the conflict is on the "same important matter." Supreme Court Rule 10(a). "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.'" *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502, 71 S. Ct. 453, 456 (1951).

I.

THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEALS WITH RESPECT TO THE STANDING ISSUE.

ITAS argues that the Seventh Circuit's decision in this case results in a split in the federal circuits. ITAS points to *Mid Atlantic Telecom v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir. 1994). The ruling in *Mid Atlantic* does not conflict with the Seventh Circuit's decision in this case. The Fourth Circuit in *Mid Atlantic* did not address any sort of RICO predicate act standing issue. Rather, it concluded that this Court's decision in *Holmes* was no bar to recovery by a plaintiff against a competitor for misleading statements made to mutual customers. The Fourth Circuit reasoned that the complaint in *Mid-Atlantic* should not have been dismissed because proximate cause might have been demonstrated (i) by the distinct injuries claimed by plaintiff as compared to the customers, and (2) by plaintiff's vindication of its own rights, not the customers'. *Id.* at 264. The Fourth Circuit never addressed the issue of whether the plaintiff had standing to proceed in the *Mid-Atlantic* case because that issue was never raised.

It remains an open question whether the Fourth Circuit will adopt a predicate act standing requirement under RICO for mail fraud, as the Seventh Circuit did in this case, and as the Ninth Circuit did in *Lancaster*. The question is open simply because the Fourth Circuit has not considered the issue. Consequently, the granting of certiorari in this case is unnecessary.[3]

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3. The lack of conflict here stands in sharp contrast with the conflict among the courts of appeals on the securities fraud standing issue, for which certiorari was granted in *Holmes*. 503 U.S. at 275-276 n.23 (listing cases).

Nor does the Seventh Circuit's decision here conflict with *Environmental Tectonics v. W.S. Kirpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1987). In that case, plaintiffs claimed to have been injured "by an apparently successful scheme . . . to influence the award of a Nigerian defense contract through the bribery of Nigerian government officials." 847 F.2d at 1054. The predicate acts alleged in support of their RICO claims included bribery and violations of the Foreign Corrupt Practices Act. *Id.* at 1063. The court concluded that plaintiffs had standing under RICO because they alleged injury to business or property "resulting from some or all of the predicate acts . . ." by their factually sufficient allegations of the bribery scheme. *Id.* at 1067. Neither the parties nor the court raised or addressed the issue of predicate act standing, and the Third Circuit's holding was based on the predicate act of bribery, which by its nature will damage third parties, unlike mail fraud.

In sum, the only cases in which courts of appeals have addressed the mail fraud standing issue are the Seventh Circuit in this case and the Ninth Circuit in *Lancaster*. Both the Seventh and Ninth Circuits concluded that a competitor does not have standing under RICO to sue another competitor for mail fraud directed at potential customers. Consequently, contrary to the argument asserted by ITAS, a conflict does not exist between the courts of appeals with respect to the mail fraud standing issue.

II.

THE QUESTION ACTUALLY RAISED BY ITAS' PETITION DOES NOT JUSTIFY THE GRANT OF CERTIORARI.

A. The Practical Effect of this Court Deciding the Standing Issue Raised by ITAS is Minimal.

According to ITAS, under the Seventh Circuit's analysis in this case, "a business competitor would never be able to obtain standing" bringing a RICO claim premised on mail fraud. This is true only in the narrow class of cases where a plaintiff's competitor commits mail fraud against mutual potential customers and plaintiff is damaged thereby. Left intact would be RICO cases in which the competitors defraud each other. Consequently, the practical effect of a ruling by this Court on the standing issue raised by the Seventh Circuit's decision would be slight.

In any event, a competitor in ITAS' shoes would not lose any appreciable opportunity for redress should the Seventh Circuit's ruling stand. Satisfactory remedies are available under federal and state law. Here, ITAS brought claims under the Lanham Act, 15 U.S.C. § 1051 *et seq.*, and the Illinois and New Jersey consumer fraud statutes. Illinois Consumer Fraud Act, 815 ILCS 505; Illinois Deceptive Trade Practices Act, 815 ILCS 510; and New Jersey Consumer Fraud Act, N.J. Rev. Stat. § 56:8-12. Each of these statutes provides relief for the type of conduct ITAS claims damaged it in this case, namely, misleading statements by a competitor to mutual potential customers.

In this case, ITAS' claims under these statutes were submitted to the jury, which rejected them. All of these statutes make provision for exemplary damages and attorneys fees to the successful plaintiff. 15 U.S.C. § 1117 (treble damages and

attorneys fees); 815 ILCS 505 (double damages and attorneys' fees); N.J. Rev. Stat. § 56:8-12. Consequently, the effect of a ruling of this Court in ITAS' favor would be an additional, duplicative remedy for competitors in ITAS' shoes.

B. The Issue Raised in this Case is Much Narrower than Presented by ITAS.

In its petition, ITAS presents the following "Question Presented" for review:

> Whether a person who is injured in their business or property through a pattern of racketeering acts, must also be within the class of persons that the alleged predicate acts were designed to protect in order to have standing to pursue a claim under the Racketeer Influenced And Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*; *i.e.*, must a civil RICO plaintiff have standing to pursue the underlying predicate acts in addition to having standing under the RICO statute itself.

ITAS incorrectly states the issue. ITAS would have this Court rule that all predicate acts are the same and should be addressed as such. However, in the *Holmes* concurrences, Justice O'Connor and Justice Scalia addressed only the issue of whether standing exists when the predicate act is the offense of securities fraud. In this case, the predicate act at issue is mail fraud. Consequently, the issue before this Court is not as presented by ITAS. Rather, the issue is whether, when a competitor allegedly engages in false advertising, the allegedly harmed competitor has standing to bring a RICO claim based on the predicate act of mail fraud.

ITAS asserts that this Question Presented is "essentially the same" as the question presented but, over the objection of four concurring justices, not reached in *Holmes*. However, the issue upon which certiorari was granted in *Holmes* addressed the specific predicate act of securities fraud. *Holmes*, 503 U.S. at 264-265. As noted above, a genuine conflict in the courts of appeals existed on this issue (*infra*, fn.3). For purposes of analysis, all predicate acts are not necessarily equal for the concurring Justices in *Holmes*. And, unlike *Holmes*, there is no dispute among the courts of appeals with respect to the question actually presented by the Seventh Circuit decision in this case.

The petition for certiorari in *Holmes* addressed a narrow standing issue: if a plaintiff could not bring a civil securities fraud claim under Rule 10b5 by virtue of not being a purchaser or seller of securities, could that same plaintiff maintain a RICO claim where the predicate act is securities fraud? *Id.*

The *Holmes* majority identified this as a Rule 10b5 "standing issue," which it did not reach, instead concluding that § 1964(c)'s "by reason of" language imposed a proximate cause limitation which plaintiff in that case did not meet. *Id.* at 265-266, 275-276. The majority concluded that the proximate cause issue was "fairly included" in the Rule 10b5 standing issue, and stated that the split in the circuits on the securities fraud "standing question" under RICO could have been resolved, in each case identified, on proximate causation grounds. *Id.* at 266, n. 12. ITAS points to the concurrences in *Holmes* as justifying a grant of certiorari in this case. However, the reasoning of Justice O'Connor's concurrence (joined by Justices White and Stevens), and Justice Scalia's separate concurrence, suggest that the standing issue asserted here by ITAS is in fact much narrower than ITAS claims and significantly different from the standing issue in *Holmes*.

Justice O'Connor's concurrence examined the RICO statute to determine the scope of its standing requirements. She began with §1964(c), noting that it contained no purchaser/seller limitation. However, Justice O'Connor then conceded that it may be necessary to review §1961(1) to determine whether a party has standing to proceed under the specific predicate act:

> Although the civil suit provisions of § 1964(c) lack a purchaser/seller requirement, it is still possible that one lurks in § 1961(1)'s catalog of predicate acts; i.e., it is possible that § 1961(1) of its own force limits RICO standing to the actual parties to a sale.

Id. at 281.

By Justice O'Connor's reasoning, the text of § 1961(1) must be consulted in determining whether predicate act standing was intended under RICO. Justice O'Connor further noted that the language of § 1961 which addresses securities fraud (§ 1961(1)(D)) is significantly different than the language addressing mail fraud (§ 1961(1)(B)). In § 1961(1), the term "fraud in the sale of securities" is not defined. In contrast, the predicate act of mail fraud contained in § 1961(1) specifically references the mail fraud statute. *Id.* at 281-283. As a result, Justice O'Connor's concurrence suggests that a standing requirement may exist with respect to RICO claims based upon the predicate act of mail fraud.

In his concurring *Holmes* opinion, Justice Scalia agreed that the purchaser/seller standing issue should have been addressed by the Court, and that a standing limitation did not apply in civil RICO cases alleging a violation of Rule 10b5 as the predicate act. Justice Scalia, however, began by distinguishing the two types of standing requirements: "statutory standing" and "zone of

interest standing." According to Justice Scalia, persons other than purchasers or sellers of securities were beyond the zone of interest of Rule 10b5 for civil cases brought under that Rule. Justice Scalia further pointed out that "zone of interest" analysis was appropriate in connection with legislation, *i.e.*, was plaintiff within the class of people intended to be protected by the statute in question? *Id.* at 286-287. Justice Scalia concluded that this type of analysis was not appropriate for civil causes of action under Rule 10b5, because these claims are judicially created. *Id.*, *cf. Blue Chip Stampsv. Manor Drug Stores*, 421 U.S. 723 (1975).

Justice Scalia stated that a separate "zone of interest" analysis would be necessary for each of the predicate acts listed in §1961(1). According to Justice Scalia, that test would "vary according to the nature of the criminal offenses upon which those causes of action are based." *Id.* at 288. Justice Scalia concluded that a RICO plaintiff must be within the "zone of interest" of the statute upon which the predicate act is based. *Id.* For the Seventh Circuit Court of Appeals in this case, Judge Easterbrook cited Justice Scalia's *Holmes* concurrence as authority for the proposition that ITAS was not within the zone of interest for the mail fraud statute, therefore failing to satisfy the standing requirements of RICO. *Israel Travel*, 61 F.3d at 258 (ITAS App.13).

For these reasons, under Justice O'Connor's concurrence and Justice Scalia's concurrence in *Holmes*, analysis of whether a RICO plaintiff bringing a claim based on predicate acts of mail fraud must meet standing requirements under the mail fraud statute is a different question than was addressed by the concurring justices. The Question Presented by ITAS simplistically (and inaccurately) treats as one all RICO claims regardless of the predicate act upon which they are based. Accordingly, ITAS has overstated its case. The issue raised by the Seventh Circuit's decision here is narrower, and

consequently of less importance, than ITAS asserts in its Petition. Furthermore, the Seventh Circuit ruling that ITAS did not have standing under the predicate act of mail fraud is supported by the concurrence of Justice Scalia and is not inconsistent with the concurrence of Justice O'Connor.

III.

WHAT ITAS IDENTIFIES AS A "DOUBLE STANDING" REQUIREMENT IS SUPPORTED BY THIS COURT'S PRIOR DECISIONS.

ITAS argues repeatedly in its Petition that the Seventh Circuit's ruling creates an unprecedented "double standing" requirement for RICO litigants. ITAS refers, first, to § 1964(c) of RICO ("Any person injured in his business or property by reason of a violation of § 1962 of this chapter . . ."), and second, to the "zone of interest" standing requirement under the mail fraud statute, which the Seventh Circuit found dispositive in this case. ITAS contends that this purported double standing requirement is novel and unprecedented. ITAS is incorrect.

Any federal litigant has always been subject to, not only the cases and controversies standing requirement of Article III of the Constitution, but also a set of prudential standing principles. These include: (1) that a plaintiff must assert its own legal rights and not those of third parties; (2) that a plaintiff cannot bring "generalized grievances" appropriately addressed in the representative branches; and (3) that plaintiff's complaint must "fall within 'the zone of interest to be protected or regulated by the statute or constitutional guarantee in question.' " *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-475, 102 S. Ct. 752, 759-760 (1982), *quoting*, *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1970); *Gladstone,*

Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1978). Consequently, multiple standing limitations, including a "zone of interest" standing requirement, are well grounded in this Court's prior decisions.

In addition, a mail fraud standing requirement here is not an unfair burden on the RICO plaintiff. What may seem an unusual result of requiring a RICO plaintiff to meet standing requirements for two separate causes of action (*i.e.*, RICO and mail fraud, in this case) is in large part a reflection of the peculiar device of the RICO statute to premise RICO liability upon predicate acts which are each themselves separate and independent causes of action. Whether mail fraud standing is required for ITAS may depend at least in part upon whether § 1961, the catalog of predicate acts, expands the explicit statutory standing requirement of § 1964(c), a possibility admitted by Justice O'Connor in her concurrence in *Holmes*. In light of the statutory scheme of RICO itself, the predicate act standing requirement is not onerous or unfair.

IV.

THE JURY'S VERDICT IN THIS CASE THAT RESPONDENTS DID NOT VIOLATE THE LANHAM ACT RENDERS ITAS' RICO CLAIMS MOOT.

Even if this Court were to consider the mail fraud predicate standing question under RICO as a significant and important issue, respondents respectfully submit that this is the wrong case to decide the question. In the trial court in this case, ITAS brought Lanham Act claims and state Consumer Fraud and Deceptive Business Practice claims against the respondents. The Lanham Act claim, which was premised upon the same acts as the RICO claims, was submitted to the jury. The jury found against ITAS, and in favor of respondents on these claims. As a result, ITAS no

longer has a basis for a RICO claim against the respondents in this case. Accordingly, with respect to petitioner and respondents here, any disposition of the RICO issue raised would not ultimately change the Seventh Circuit's conclusion that ITAS does not have a RICO claim.

V.

PROPER APPLICATION OF HOLMES WOULD DISPOSE OF THIS CASE ON PROXIMATE CAUSATION GROUNDS.

The majority in *Holmes* stated that proximate causation analysis would have resolved what was asserted to be a conflict in the Circuits with respect to the purchaser/seller standing issue under RICO. Both the Seventh Circuit in this case and the Fourth Circuit in *Mid Atlantic Telecom* applied the proximate cause rule described in *Holmes*. Respondents respectfully submit that the Seventh Circuit misapplied the *Holmes* standard in this case in concluding that ITAS met the proximate cause standard under *Holmes*. The district court entered summary judgment on the RICO claims because ITAS failed to demonstrate proximate cause between its injuries and the conduct of IIT-NJ and Larry Ritter. The trial court correctly relied upon *Holmes* when it concluded that ITAS could not establish proximate cause in this case.

In *Holmes*, this Court ruled that a party whose injury is indirect, as in this case, cannot establish that its injuries were proximately caused by the defendants' predicate acts.

> We hold not that RICO cannot serve to right the conspirators' wrongs, but merely that the nonpurchasing customers . . . are not proper plaintiffs . . . Allowing suits by those injured

> only indirectly would open the door to 'massive and complex damages litigation.' *Associated General Contractors*, 459 U.S. at 545, 103 S. Ct. at 912.

Holmes, 503 U.S. at 274. In this case, ITAS was neither a purchasing or a non-purchasing customer of IIT-NJ so any claimed injury was clearly indirect.[4]

This Court concluded that, for proximate cause to exist in RICO cases, there must be proof of "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* at 273. Thus, a plaintiff who complains of harm merely flowing from the misfortunes visited upon a third person by the defendants' acts stands at too remote a distance to recover. *Id.*

ITAS cannot overcome the requirement of direct injury to prove proximate cause. ITAS failed to show that customers were deceived by the alleged predicate acts of IIT-NJ who consequentially travelled with IIT-NJ instead of ITAS. But, even if ITAS had made such a showing, that would have been insufficient to establish proximate cause pursuant to *Holmes*.

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4. In *Holmes*, the plaintiff was a broker-dealer who represented customers who had allegedly been defrauded by the defendant. The Supreme Court ruled that only the injuries of the customers, not the broker-dealer, were proximately caused by the defendant's predicate acts. *Holmes*, at 272-274.

CONCLUSION

There is no conflict in the federal circuits on the issue presented by ITAS' petition. The issue presented is a narrow one, which would affect only a small subset of RICO claimants: plaintiffs suing a competitor under RICO based on mail fraud, where misleading information has allegedly been disseminated to customers. Finally, what ITAS decries as a "double standing" requirement is well supported in this Court's previous cases including the concurrences in *Holmes*. For the foregoing reasons, as well as the fact that the jury decision has rendered the respondents' liability in this case moot, respondents respectfully request that the Petition for Certiorari filed by ITAS be denied.

Respectfully submitted,

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